DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-74
Title: Marcus Hardy, Warden, Petitioner
v.
Irving L. Cross
Docketed: July 18, 2011
Linked with 10A1111
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (09-1666)
Decision Date: January 13, 2011
Rehearing Denied: February 14, 2011

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
May 6 2011	Application (10A1111) to extend the time to file a petition for a writ of certiorari from May 15, 2011 to July 14, 2011, submitted to Justice Kagan.
May 13 2011	Application (10A1111) granted by Justice Kagan extending the time to file until July 14, 2011.
Jul 14 2011	Petition for a writ of certiorari filed. (Response due August 17, 2011)
Aug 11 2011	Order extending time to file response to petition to and including September 16, 2011.
Aug 20 2011	Brief of respondent Irving L. Cross in opposition filed.
Aug 20 2011	Motion for leave to proceed in forma pauperis filed by respondent.
Aug 30 2011	Reply of petitioner Marcus Hardy, Warden filed.
Aug 31 2011	DISTRIBUTED for Conference of September 26, 2011.
Oct 3 2011	DISTRIBUTED for Conference of October 7, 2011.
Oct 11 2011	DISTRIBUTED for Conference of October 14, 2011.
Oct 24 2011	DISTRIBUTED for Conference of October 28, 2011.
Oct 28 2011	Record Requested.
Oct 31 2011	DISTRIBUTED for Conference of November 4, 2011.
Nov 2 2011	Record received from the United States Court of Appeals for the Seventh Circuit (one box). Additional portions of record on PACER.
Nov 7 2011	DISTRIBUTED for Conference of November 10, 2011.
Nov 14 2011	DISTRIBUTED for Conference of November 22, 2011.
Nov 28 2011	DISTRIBUTED for Conference of December 2, 2011.
Dec 5 2011	DISTRIBUTED for Conference of December 9, 2011.
Dec 12 2011	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Dec 12 2011	Petition GRANTED. Judgment REVERSED. Opinion per curiam. (Detached Opinion)
Jan 3 2012	Petition for Rehearing filed.
Jan 11 2012	DISTRIBUTED for Conference of February 17, 2012.

Feb 21 2012 Rehearing DENIED.
Feb 21 2012 JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 11- 11-74

In the
Supreme Court of the United States

MARCUS HARDY, Warden,
PETITIONER,

v.

IRVING L. CROSS,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has held that a missing witness is "unavailable" for trial, and that the Sixth Amendment therefore permits the prosecution to introduce her prior testimony in a future proceeding, so long as the State has made a "reasonable," "good faith" effort to find her. In this case, the state court upheld the introduction of a missing witness's prior, cross-examined testimony at respondent's trial, after concluding that the prosecution had undertaken "superhuman" efforts to find the witness and that additional investigation would have been "futile." The Seventh Circuit overturned respondent's conviction on federal habeas corpus review on the ground that prosecutors could have done more to ensure the witness's appearance at trial.

Did the Seventh Circuit violate 28 U.S.C. § 2254 and a long line of this Court's decisions by overriding state court determinations of law and fact and awarding habeas relief based on a constitutional rule that this Court has never recognized and that the Seventh Circuit derived entirely from its own precedent?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marcus Hardy, Warden of Stateville Correctional Center in Joliet, Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which, in a published opinion, reversed the district court's denial of habeas relief pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit granting habeas relief (App. 1a-14a) is reported at 632 F.3d 356. The memorandum opinion of the United States District Court for the Northern District of Illinois denying relief (App. 15a-32a) is unpublished but reported at 2009 WL 367502. The order of this Court denying a petition for writ of certiorari on direct appeal (App. 33a) is reported at 543 U.S. 822 (Mem.). The order of the Supreme Court of Illinois denying a petition for leave to appeal on direct appeal (App. 34a) is reported at 803 N.E.2d 488 (Table). The unpublished opinion of the Illinois Appellate Court affirming Cross's judgment of conviction on two counts of criminal sexual assault (App. 35a-120a) is unreported.

JURISDICTION

The court of appeals entered judgment on January 13, 2011 and denied petitioner's timely petition for rehearing and rehearing en banc on February 14, 2011. App. 1a-14a, 121a. On May 13, 2011, Justice Kagan extended until July 14, 2011 the time within which to

file a certiorari petition. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to * * * be confronted with the witnesses against him."

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;
>
> * * *
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be

correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT

The decision below awards federal habeas corpus relief to an Illinois prisoner because the state courts purportedly applied the Sixth Amendment unreasonably. In violation of federal habeas law, the Seventh Circuit reached that conclusion only by construing its own, circuit precedent to announce constitutional requirements that this Court has never recognized and that other circuits refuse to impose. Further, the decision below disregards a finding of fact at the core of the state appellate court's decision, without requiring any evidence—much less the "clear and convincing" evidence that AEDPA demands—that this state court finding was erroneous. The decision below should be reversed, either summarily or after briefing and argument.

1. In 1999, respondent Irving Cross was tried by a jury on four counts of aggravated criminal sexual assault, two counts of criminal sexual assault, one count of aggravated kidnapping, and one count of kidnapping for the 1998 sexual assault of nineteen-year-old A.S. App. 36a, 39a. The jury returned a not-guilty verdict for aggravated kidnapping, and the court declared a mistrial on the remaining counts. App. 35a, 42a.

2. In early 2000, the State prepared to retry Cross. App. 42a. On March 28, 2000, after seeking unsuccessfully to locate A.S., the State moved to declare her "unavailable" and thereby use her prior

testimony—including extensive cross-examination by defense counsel—at Cross's second trial. App. 43a, 44a. The State's motion explained that on November 5, 1999, A.S. and her mother learned of the mistrial, and A.S. stated that she was willing to testify again. App. 43a. Since that time, the prosecutor had been in "constant contact" with A.S. and her mother, and A.S. had given "every indication" that she would testify at the retrial although she was "extremely frightened." *Ibid.* On March 10, 2000, the prosecutor learned from A.S.'s mother that A.S. had left home the day before and had not returned, at which point the State took steps to locate her. App. 43a-44a.

At a hearing on the State's motion, state investigator Mary Ember described those steps. App. 44a. She had checked repeatedly with A.S.'s mother, brother, and father, the Medical Examiner's office, "public health," Cook County Hospital, Cook County jail, the Illinois Department of Corrections, the Illinois Department of Public Aid, the Illinois Secretary of State, and the "Immigration Department." *Ibid.* A.S.'s mother told Ember that A.S. was "very fearful and very concerned" about returning to court. *Ibid.*

Detective Allen Jaglowski was also deployed to find A.S. App. 45a. He testified that he went to A.S.'s mother's home and returned, at different times of day, approximately every third day. *Ibid.* Jaglowski also went to A.S.'s father's home. *Ibid.* No one at either residence had seen A.S. for some time. *Ibid.* Jaglowski even visited A.S.'s mother on the morning of the motion hearing. *Ibid.* On that occasion, her mother advised Jaglowski that A.S. had called her about two weeks

earlier, and that A.S. indicated she was afraid and would not return to Chicago when told the police were looking for her. *Ibid.* A.S. provided her mother with no means of communicating with her while in hiding. *Ibid.* Jaglowski also checked the Medical Examiner's office, the Cook County Department of Corrections, and the house of a longtime friend of A.S.'s in Waukegan, Illinois. *Ibid.*

Finally, Claudia Morales, a victim-witness advocate for the prosecutor's office, testified that she met with A.S. and her mother both before and after Cross's first trial. *Ibid.* According to Morales, A.S. was "very afraid" to testify at the second trial but agreed to do so. App. 45a-46a. In March 2000, Morales called A.S.'s mother, who mentioned A.S.'s ex-boyfriend in Waukegan[1] and her enrollment in cosmetology school, although A.S. had not appeared at school for some time. App. 46a. Morales relayed this information to Jaglowski. *Ibid.*

Following the hearing on the State's motion, the trial court concluded that the State had "expended efforts that go way beyond due diligence," and that A.S. had made it impossible for the State to locate her because she did not wish to be found. *Ibid*; see also *ibid.* (State made good faith, "superhuman efforts" to locate A.S.). Accordingly, the court held that admission of A.S.'s prior, cross-examined testimony at trial would not violate Cross's confrontation rights. *Ibid.*

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[1] The record does not indicate whether the ex-boyfriend and the longtime friend in Waukegan are the same person. App. 19a n.3.

3. At the second trial, a police officer testified that on August 6, 1998, at approximately 4:25 a.m., he was flagged down by Leroy Hearon, who was driving a van with A.S. in the backseat. App. 47a. A.S.'s clothing was dirty, she had plant material stuck to her hair and clothes, and her face appeared red and puffy, as though she had been crying. *Ibid.* A.S. stated that she had been raped by a black male, whom she described as approximately six feet tall, 175 pounds, 30-35 years old, balding, with a mustache, a pockmarked face, and dark clothing. App. 47a, 48a. A.S. showed McCall the scene of the attack—a nearby backyard off of an alley behind a garage. App. 47a. Officer August Cervantes brought Cross, who matched A.S.'s description, to the scene. App. 48a. A.S. immediately identified Cross as her attacker. *Ibid.*

Because A.S. was unavailable, a law clerk from the prosecutor's office read A.S.'s testimony, including an extensive cross-examination by defense counsel, from the first trial. App. 44a, 50a-51a. Other witnesses testified about the aftermath of the crimes, forensic evidence, and Cross's apprehension. App. 48a-50a, 55a-58a. The jury returned guilty verdicts for two counts of criminal sexual assault and not-guilty verdicts for two counts of aggravated criminal sexual assault. App. 35a-36a. The court sentenced Cross to two consecutive thirty-year terms of imprisonment. App. 36a.

4. Among his arguments on appeal, Cross claimed that the State violated his Sixth Amendment confrontation rights by admitting A.S.'s testimony without establishing that she was "unavailable" to

appear in person at the second trial. App. 36a, 74a. The state appellate court rejected that claim, holding that the State had conducted a good faith, diligent search for A.S. App. 83a. The court held that it was "clear" from the evidence that A.S. had left Chicago, gone into "hiding[,] and did not want to be located." *Ibid.* Nevertheless, the State had "engaged two of its own employees as well as a detective" and had "undert[aken] an extensive search for A.S.," which included interviewing her family and friends, searching public records, and traveling to Waukegan. App. 44a-46a, 83a. These efforts were "reasonable" and thus sufficient to satisfy the constitutional standard for declaring a witness unavailable and admitting her prior, cross-examined testimony. App. 83a.

The state appellate court found no authority for Cross's argument that the Sixth Amendment required the State "to undertake efforts to maintain contact with A.S. during the intermission between trials," and to "subpoena A.S. or issue a bench warrant for her arrest." App. 84a-85a. And the court held specifically that pursuit of the "leads" Cross proposed for the State's investigation "would have been futile." App. 85a.

5. On October 3, 2005, Cross filed a federal habeas petition pursuant to 28 U.S.C. § 2254, raising his Sixth Amendment and other claims. Docs. 1, 7. The district court denied Cross's petition, holding in relevant part that the state appellate court did not unreasonably apply this Court's precedents in sustaining the admission of A.S.'s prior, cross-examined testimony. App. 15a, 24a-30a. As a threshold matter, the district court held that the state appellate court correctly

articulated the applicable Sixth Amendment standard—that a witness is constitutionally unavailable (for purposes of admitting her prior, cross-examined testimony) if "the government demonstrate[s] that it has made a good-faith [though unsuccessful] effort to obtain [the] witness's presence at trial." App. 24a-26a; see also App. 25a (government must undertake "reasonable[]" efforts but need not engage in "futile acts"). Deferring to the state appellate court's findings regarding the State's efforts to find A.S., the district court then held that the state court's application of this Sixth Amendment standard was not unreasonable, especially in light of other cases upholding similar efforts as constitutionally adequate. App. 28a-29a (collecting cases).

Specifically, and like the state appellate court, the district court rejected Cross's argument that the Sixth Amendment required the State "to keep A.S. under subpoena in order to demonstrate good faith." App. 27a. The court explained that *Berger v. California*, 393 U.S. 314 (1969) (*per curiam*) (on which Cross relied) did not require such measures, and lower courts had "consistently rejected the argument that the Confrontation Clause requires prosecutors to issue [a] subpoena or take other proactive measures when a witness appears to be hesitant to testify at trial." App. 27a. (collecting cases). In any event, the district court concluded, "the state had no apparent reason to keep [A.S.] under subpoena" because her testimony at the first trial "demonstrated [her] willingness to testify." *Ibid.*

Finally, the district court declined to grant federal habeas relief merely "because the state could have done more" to locate A.S. App. 28a. "Investigators could always investigate other leads," the court reasoned, "but the Constitution does not require the state to pursue increasingly improbable leads in perpetuity. It requires reasonableness. The state undertook significant efforts to locate A.S., despite her declared intention not to return to the city and her refusal to inform even her mother of her whereabouts." *Ibid.*

6. The Seventh Circuit reversed. Like the district court, the court of appeals recognized that "the Illinois appellate court accurately laid out the applicable law governing unavailability." App. 8a-9a. But the Seventh Circuit was ultimately "unconvinced by" the state court's "reasoning." App. 10a. Relying on its own decision on a direct criminal appeal in *United States v. Hite*, 364 F.3d 874 (7th Cir. 2004), cert. granted and judgment vacated, 543 U.S. 1103 (2005), the Seventh Circuit held that, in its view, the State's efforts to locate A.S. were "insufficient to satisfy the Confrontation Clause." App. 10a. Rejecting, without discussion, the state court's finding that additional search measures would have been futile, see *supra* p. 7, the Seventh Circuit opined that the information state investigators unearthed in their search was neither "noteworthy" nor "particularly helpful," and that the prosecution therefore should have taken additional steps to find A.S. App. 10a-11a. Again relying solely on its own circuit precedent, the court concluded that "'[i]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith

may demand their effectuation.'" App. 13a (quoting *Burns v. Clusen*, 798 F.2d 931, 937 (7th Cir. 1986)).

Specifically, the Seventh Circuit faulted the State for not subpoenaing A.S. App. 13a. The court indicated that "Supreme Court precedent supports the use of such a court process to obtain the presence of certain material witnesses," *ibid.* (citing *Ohio v. Roberts*, 448 U.S. 56 (1980), *Barber v. Page*, 390 U.S. 719 (1968), and *Berger*), but the Seventh Circuit purported to find direct authority for its subpoena requirement only in its own precedent, App. 13a-14a ("We have held that the government's use of subpoenas or material witness arrest warrants is strong evidence of good faith.") (citing *United States v. Ochoa*, 229 F.3d 631 (7th Cir. 2000)). From the foregoing, the court extrapolated a Sixth Amendment rule that prosecutors must subpoena a missing witness for trial, if not in every case, then at least in every case where the witness is "critical" and the State learns "of her reluctance to testify and her proclivity to disappear without informing anyone of her whereabouts." App. 13a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's published decision defies AEDPA and this Court's repeated admonition that lower court precedent is not a proper source of constitutional law on federal habeas review. For a state court to apply federal law "unreasonably," that law must be "clearly established" by the decisions of this Court alone. Accordingly, where this Court has announced a constitutional rule only in general terms, state courts enjoy maximum latitude in applying it. And a state court's application of a general rule is particularly difficult to condemn as "unreasonable" when it is consistent with other federal appellate decisions.

The Sixth Amendment rule on which this case turns is a general one—the State must undertake "reasonable," "good faith" efforts to secure a witness for trial before that witness is considered "unavailable" for Confrontation Clause purposes—and the Seventh Circuit recognized that the state court recited this rule properly in sustaining Cross's conviction. The Seventh Circuit nevertheless overturned that conviction, not because anything in this Court's decisions required it, but because the Seventh Circuit construed its own case law to impose more specific Sixth Amendment duties on the State. The court of appeals so held, moreover, notwithstanding decisions from other circuits that alone confirm the reasonableness of the Illinois court's ruling. Finally, in yet another violation of AEDPA, the Seventh Circuit faulted state prosecutors for failing to undertake the additional measures that its circuit precedent purportedly required, without affording any deference

to the state court's express finding that pursuing additional leads in the search for A.S. would have been futile.

These patent errors—in a published decision that threatens federal habeas law in the Seventh Circuit and runs contrary to decisions of other circuit courts—warrant reversal by this Court, either summarily or following full briefing and argument. See, *e.g.*, *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (*per curiam*) (summarily reversing Seventh Circuit's grant of habeas relief for failure to afford state court's decision AEDPA deference); see also *infra* p. 23.

1. "Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), by placing "new constraint[s] on the power of a federal habeas court to grant a state prisoner's application," *Woodward v. Garceau*, 538 U.S. 202, 206 (2003) (internal quotations omitted; brackets in original). Under this subsection, state courts' purported misapplication of federal law is grounds for habeas relief only if their decisions run "contrary to, or involve[] an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added); see, *e.g.*, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1399 (2011) ("State-court decisions are measured against this Court's precedents as of the time the state court renders its decision.") (internal quotations omitted); *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011) ("Federal habeas relief may not be granted for claims subject to § 2254(d) unless it is shown that the earlier state court's decision

'was contrary to' federal law then clearly established in the holdings of this Court."). Thus, a federal court may not void a state conviction based on its own, circuit precedent; only constitutional rules "clearly established" by this Court apply. See, *e.g.*, *Renico v. Lett*, 130 S. Ct. 1855, 1865-1866 (2010).

2. The corollary to this rule is that the more general the constitutional standard as announced by this Court, the more latitude States have in applying it:

> "[e]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."

Richter, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). With a general rule, it is more likely that there will be "no 'plainly correct or incorrect' answer in" a given case. *Lett*, 130 S. Ct. 1865 (quoting *Alvarado*, 541 U.S. at 664); see, *e.g.*, *Pinholster*, 131 S. Ct. at 1403 (denying habeas relief because standard against which petitioner's ineffective assistance of counsel claim was judged is general and thus provided state courts with greater latitude).

3. The Sixth Amendment rule on which Cross's habeas petition turns is a general one. A witness is constitutionally "unavailable"—so that transcripts from a prior court proceeding (at which the witness was subject to cross-examination) are admissible in lieu of live testimony—so long as the State "made a good-faith effort to obtain [her] presence at trial." *Barber*, 390 U.S. at 724-725. Whether the government's efforts satisfy

this standard is determined by their overall "reasonableness." *Roberts*, 448 U.S. at 74 (internal quotations omitted). Currently, this Court's decisions do not provide any more specific guidance, beyond these general pronouncements, and the foregoing is therefore the only "clearly established Federal law" that Illinois courts needed to apply reasonably to survive federal habeas review.

4. And as the district court correctly held, see App. 24a-30a, the Illinois Appellate Court applied this law reasonably. Even the Seventh Circuit acknowledged that the state court properly recited this Court's general rule. See App. 8a-9a. And nothing in this Court's jurisprudence supports, much less compels, the conclusion that the State's substantial efforts in seeking to locate A.S.—which included engaging three people to interview A.S.'s family and friends, to search public records, and to contact relevant agencies and institutions, see *supra* pp. 4-5—were unreasonable or undertaken in bad faith.

If anything, the three Supreme Court decisions cited by the Seventh Circuit—*Barber*, *Berger*, and *Roberts*—support the contrary conclusion. Of the three, *Barber* is the only one to find a Sixth Amendment violation, and the Court did so only because, in sharp contrast to this case, the prosecution made "absolutely no effort" to take available measures to secure the absent witness, an inmate incarcerated at a known location in a neighboring State. 390 U.S. at 723-725; see also *id.* at 725 ("the sole reason why [the witness] was not present to testify in person was because the State did not attempt to seek his presence"). *Berger*, in

turn, added nothing to the constitutional analysis, for it held merely that the rule announced in *Barber* had retroactive effect. Rather than find a Sixth Amendment violation (as the Seventh Circuit wrongly stated, see App. 13a), *Berger* merely remanded the case for application of the newly released decision in *Barber*. See 393 U.S. at 315.

Finally, *Roberts* actually *upheld* the State's efforts in that case as reasonable—efforts that were, if anything, less comprehensive than Illinois's attempts to find A.S. In *Roberts*, a direct criminal appeal, the government had served five subpoenas, but this was an empty exercise, for they were all served at the same location (the home of the witness's parents), and the one interview investigators did perform was with a parent who said that the witness had left home. See 448 U.S. at 75-76. Prosecutors failed to contact an out-of-state social worker who had spoken with the missing witness or even to communicate with the witness prior to trial. See *id.* at 58-59, 75-76. Yet in words that alone establish the reasonableness of the state court's decision here, the *Roberts* Court held that "the great improbability that [additional] efforts would have resulted in locating the witness, and would have led to her production at trial, neutralizes any intimation that the concept of reasonableness required their execution." *Id.* at 76. The Illinois Appellate Court likewise determined that, on the facts of this case and given the State's efforts to find A.S., further measures would have been futile. See App. 85a. As the district court held, see App. 24a-30a, this was a reasonable application of this Court's "clearly established" law.

5. Rather than afford the state court the heightened deference that AEDPA requires when the constitutional rule at issue is a general one, however, the Seventh Circuit used the absence of more specific Supreme Court authority to announce and apply its own view of what the Constitution demands. Such a clean-slate evaluation of what is "reasonable" for Sixth Amendment purposes would be appropriate on direct appeal, but not on habeas review, where a federal court must defer to a state court determination not foreclosed as unreasonable by this Court's precedent. See, *e.g.*, *Richter*, 131 S. Ct. at 785 (distinguishing between error sufficient to reverse on direct appeal and finding required to grant habeas relief). Here, as in *Richter*, "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA," *id.* at 786, for the Seventh Circuit faulted the state court for purportedly failing to hold prosecutors to constitutional duties never "clearly established" by this Court.

Specifically, the decision below concludes that the State should have taken "other proactive measures" to find A.S., including that prosecutors "should have issued a subpoena to secure [her] presence" at trial. App. 12a-13a. And while the Seventh Circuit appeared to recognize that this Court's precedent does not compel such a requirement—suggesting merely that *Barber*, *Berger*, and *Roberts* somehow combine to "support[]" such a rule, App. 13a—the Seventh Circuit found more direct authority requiring issuance of a subpoena and other "proactive measures" in its own case law. The decision below thus cites *Burns v. Clusen*, a pre-AEDPA habeas case, for the proposition that "'[i]f there is a

possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation,'" *ibid.*, a proposition that is out of line with the above-quoted language in *Roberts*, see *supra* p. 15.

The Seventh Circuit also cited its decision in *United States v. Hite*, a non-habeas, direct appeal, as authority for its conclusion that Illinois's efforts to find A.S. were "insufficient to satisfy the Confrontation Clause." App. 10a. Again, however, any specific duties that the decision below construes *Hite* to impose on prosecutors are not mandated by this Court's decisions. And *Hite* did not involve the Confrontation Clause in any event; rather, the defendant there challenged the district court's ruling that a defense witness was not "unavailable" within the meaning of the hearsay exception in Fed. R. Evid. 804(b)(3). See 364 F.3d at 882-883.

Finally, for its specific ruling that the Sixth Amendment required prosecutors to subpoena A.S., the court relied on its prior decision in *United States v. Ochoa*, another case decided on direct appeal rather than on habeas review. See App. 13a-14a. But again, no decision of this Court construes the Sixth Amendment to require prosecutors to subpoena reluctant witnesses, and the Seventh Circuit may not rely on its own precedent as "clearly established" federal law. In fact, however, even *Ochoa* did not interpret the Sixth Amendment to require the State to subpoena a witness. *Ochoa* considered the prosecution's issuance of a subpoena, among other state measures, in concluding that the government's efforts in that case were

"reasonable," but the court nowhere suggested that the subpoena was constitutionally required. 229 F.3d at 637-638. It is the Seventh Circuit's decision in this habeas case that first announced the circuit's new, more ambitious constitutional rule that prosecutors must subpoena a witness whenever that witness is "critical" and the State is aware "of her reluctance to testify and her proclivity to disappear" without notice. App. 13a.

As this Court has held time and again, such reliance on circuit precedent to fill in the gaps left open by Supreme Court case law violates AEDPA, and this alone is grounds to reverse the decision below. See, *e.g.*, *Lett*, 130 S. Ct. at 1866 (circuit court's decision "does not constitute 'clearly established Federal law, as determined by the Supreme Court,' § 2254(d)(1), so any failure to apply that decision cannot independently authorize habeas relief under AEDPA"); *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009) (circuit court failed to "cite any Supreme Court decision establishing a 'nothing to lose' standard in any of its three opinions in this case," precluding habeas relief "based on such a standard"); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'") (brackets in original). "'[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'" *Richter*, 131 S. Ct. at 786 (quoting *Mirzayance*, 129 S. Ct. at 1413-1414). And this

Court has never required prosecutors to take the additional steps that the Seventh Circuit now demands.

6. In fact, the Seventh Circuit's misapplication of AEDPA was even more pronounced here, for several other circuits have rejected the constitutional requirement that the decision below announces. The fact that other federal courts are in line with the Illinois Appellate Court's decision is conclusive proof (if any were needed) that the latter decision was not an unreasonable application of this Court's Sixth Amendment precedent. See, *e.g.*, *Price v. Vincent*, 538 U.S. 634, 643 & n.2 (2003) (to support conclusion that state supreme court did not apply federal law unreasonably, Court explained that "numerous other [state and federal] courts [had] refused to find double jeopardy violations under similar circumstances"); see also *Musladin*, 549 U.S. at 76 (in denying habeas relief, citing fact that "lower courts have diverged widely in their treatment of defendants' * * * claims"); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (*per curiam*) (in denying habeas relief, remarking that "federal appellate courts have split on" disputed question).

Specifically, like the Illinois Appellate Court, several federal courts of appeals have declined to require prosecutors to take a particular affirmative step—including issuing a subpoena—before declaring a witness unavailable. Thus, the Ninth Circuit has held that "[t]he good faith obligation to resort to [an out-of-state witness subpoena] * * * arises only when the prosecutor knows the location of the witness." *Dres v. Campoy*, 784 F.2d 996, 999 (9th Cir. 1986) (citing *Poe v. Turner*, 490 F.2d 329, 331-332 (10th Cir. 1974)). In

other words, once good faith efforts to locate a witness prove unsuccessful, as they did here, there is no requirement to serve a futile subpoena. See *ibid.* Nor does the Constitution require the prosecutor to issue an anticipatory subpoena when the witness's whereabouts are still known. See *id.* at 1000. Rather, the Ninth Circuit has held that the prosecutor may legitimately make the "tactical decision * * * not to serve * * * a subpoena," for fear the witness "might flee" in response. *Ibid.* In reaching these conclusions, the Ninth Circuit rejected the argument that "*Barber* * * * suggests that a finding of good faith is precluded when the prosecutor fails to use [a subpoena]." *Id.* at 999. In short, the Ninth Circuit's decision is impossible to reconcile with the Seventh Circuit's holding here.

The Second, Eighth, and Tenth Circuits likewise have declined to impose strict rules requiring the use of subpoenas to establish a witness's unavailability. See *Christie v. Hollins*, 409 F.3d 120, 125 (2d Cir. 2005) (defense not required to subpoena witness to establish her unavailability for purposes of admitting prior, cross-examined testimony because "nothing in the record supports a belief that [the witness] could have been located to effect service of a subpoena"); *United States v. Johnson*, 108 F.3d 919, 922 (8th Cir. 1997) (prosecution's failure to subpoena witness did not preclude finding of unavailability); *Martinez v. Sullivan*, 881 F.2d 921, 924 n.1 (10th Cir. 1989) ("per se rule requiring use of [an out-of-state subpoena] in all cases as a necessary prerequisite to a finding of unavailability for purposes of the Confrontation Clause" is "contrary to decisions of the Supreme Court"); *Poe*, 490 F.2d at

332 (because whereabouts of witness were not known, subpoena not required to establish unavailability). At the very least, these decisions establish conclusively that the Illinois Appellate Court's decision here was not unreasonable.

7. For the foregoing reasons, the Seventh Circuit's decision violates § 2254(d)(1); but the court also withheld the deference that § 2254(e)(1) requires. The state appellate court determined that the evidence was "clear" that A.S. had left Chicago, gone into "hiding[,] and did not want to be located." App. 83a. Addressing Cross's argument that the State should have looked harder for A.S., the state court further held that pursuit of the "leads" Cross had proposed for the State's investigation "would have been futile." App. 85a. This factual finding is "presumed to be correct" on federal habeas review, and Cross offered no evidence, much less "clear and convincing evidence," to rebut that presumption. 28 U.S.C. § 2254(e)(1); see generally *Schriro v. Landrigan*, 550 U.S. 465, 473-474 (2007) (AEDPA "requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'").

But the Seventh Circuit, without mentioning § 2254(e)(1), disregarded the state court's finding that further measures to find A.S. and secure her appearance at trial would have been futile. The Seventh Circuit agreed with Cross that there were additional avenues the State should have pursued to satisfy its Sixth Amendment obligations (such as contacting A.S.'s current boyfriend or other Chicago-area friends, or

people affiliated with the beauty school A.S. had once attended). App. 11a. But the state appellate court had already rejected "investigat[ing] or question[ing] additional individuals" as "futile." App. 85a.[2] The Seventh Circuit's rejection of this finding of fact, without requiring "clear and convincing" evidence to overcome its presumption of correctness, contravenes § 2254(e)(1) and provides an independent reason to grant this petition and reverse the judgment below.

* * *

The Seventh Circuit's failure to defer to state court conclusions of law and findings of fact on federal habeas review, and its reliance on its own precedent for "clearly established" law, warrant this Court's intervention. Reviewing habeas petitions is "a commitment that entails substantial judicial resources." *Richter*, 131 S. Ct. at 780. "Those resources are diminished and misspent, however, and confidence in the writ and the law it vindicates undermined, if there is judicial

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[2] The state appellate court considered and rejected Cross's "argument that the State failed to follow specific additional leads or to investigate or question additional individuals as identified by [Cross]." App. 85a. The state court provided further "comment * * * on only one of [Cross's] arguments," that "the State should have interviewed people on the 'street corners' where A.S. 'carried out her trade.'" *Ibid.* That the state court did not specifically reject as futile each of the purported "leads" that Cross proffered is of no moment. *Cf. Pinholster*, 131 S. Ct. at 1402 ("Section 2254(d) applies even where there has been a summary denial.").

disregard for the sound and established principles that inform its proper issuance." *Ibid.* Where, as here, a court disregards these dictates, this Court has granted certiorari and summarily reversed. See *Bobby v. Mitts*, 131 S. Ct. 1762, 1765 (2011) (*per curiam*) (summarily reversing grant of federal habeas relief because state court determination that penalty phase instructions did not improperly influence jury to impose death sentence not unreasonable application of clearly established Federal law); *Felkner v. Jackson*, 131 S. Ct. 1305, 1307-1308 (2011) (*per curiam*) (same regarding grant of habeas relief on *Batson v. Kentucky*, 476 U.S. 79 (1986), claim); *Van Patten*, 552 U.S. at 126 (*per curiam*) (same regarding grant of habeas relief on ineffective assistance of counsel claim); *Bell v. Cone*, 543 U.S. 447, 459-460 (2005) (*per curiam*) (same regarding grant of habeas relief on claim that jury instructions violated Eighth Amendment). Likewise, this Court should summarily reverse here or, in the alternative, grant this petition and set the case for full briefing and argument. Either way, the decision below, which is impossible to reconcile with AEDPA, decisions of this Court, and the law in other circuits, should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2011

APPENDICES*

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* The appendix contains an accurate reproduction of the court orders and opinions contained therein. Any typographical errors are from the originals.

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 09-1666

IRVING L. CROSS,
Petitioner-Appellant,

v.

MARCUS HARDY, Acting Warden,*
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 1:05-cv-05692—**William J. Hibbler**, *Judge*.

ARGUED NOVEMBER 30, 2009—DECIDED JANUARY 13, 2011

Before KANNE, ROVNER, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*. Irving Cross was arrested and charged with several counts of kidnapping and sexual assault in connection with the alleged rape of a

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* We substitute Marcus Hardy, the current warden of Stateville Correctional Center, as the Respondent in this action. *See* Fed. R. App. P. 43(c)(2).

woman Cross claimed was working as a prostitute. According to Cross, the complainant consented to the sexual contact in exchange for money and drugs. During Cross's first trial, the jury returned a verdict of not guilty on the kidnapping count but was unable to reach a verdict as to the sexual assault counts. At Cross's retrial on the sexual assault charges, the jury found him guilty of sexual assault, but not guilty of aggravated sexual assault. Cross raised several challenges to the trial court's evidentiary rulings, including its finding that the complainant was unavailable, which permitted the admission of her testimony from the first trial during the second trial. The Illinois appellate court rejected Cross's arguments and affirmed the conviction. Cross later filed a federal habeas petition pursuant to 28 U.S.C. § 2254, which the district court denied. Cross now petitions this court for review, arguing that the state courts improperly concluded that the complainant was unavailable. We find that the state failed to demonstrate that it employed good faith efforts to locate the complainant and that the state appellate court unreasonably applied federal law when it concluded that the complainant was unavailable. Therefore we grant the petition and remand for further proceedings consistent with this opinion.

I. BACKGROUND[1]

On August 6, 1998, Irving Cross was arrested for sexually assaulting a 19-year-old woman (only identified by her initials, "A.S.") at knifepoint thirty minutes before the arrest. Cross maintained that the sexual contact was consensual and that he had given the complainant money and drugs in exchange for sex. Cross was charged with several counts of criminal sexual assault, aggravated sexual assault, and aggravated kidnapping. He was tried before a jury in November 1999. Before trial, Cross filed an answer to pretrial discovery in which he asserted a consent defense and sought to introduce evidence that A.S. told the doctor who examined her after the incident that "she had been a hooker up until last week" and that she "has used rock cocaine." Cross also sought to introduce his statement to police from the night of the incident, in which he described meeting A.S. at a bus stop in Chicago, giving her money to purchase crack cocaine, smoking the drugs with her in the backyard of an abandoned house, and then having consensual sex with

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[1] While this appeal was pending, Cross filed a motion to supplement the record with additional items that were not included in the record at the district court. We generally do not supplement the record on appeal, *Ruvalcaba v. Chandler*, 416 F.3d 555, 563 n.2 (7th Cir. 2005), but "have allowed a habeas petitioner to supplement the record on rare occasions . . . when the information included was important to an understanding of the prior proceedings in a plaintiff's case," *George v. Smith*, 586 F.3d 479, 486 n.1 (7th Cir. 2009). Here, we need not rule on the motion because we have reached a decision without reference to the additional citations.

her. The state filed motions *in limine* to preclude Cross from asking about A.S.'s background as a prostitute, her drug use, and Cross's statements to police. The trial court granted the state's motions, finding that any statements about A.S.'s history as a prostitute were barred by Illinois's rape shield statute, 725 ILCS § 5/115-7, and that the alleged prior prostitution was not relevant to whether she consented to sexual contact with Cross on the night in question. The trial court also granted the state's motion with respect to Cross's statements to police and the evidence of A.S.'s drug use, which the court found would only be relevant if it showed that A.S. used drugs on the day of the incident or the day before, as that could affect her ability to observe and recall the incident.

At trial, A.S. was the state's primary witness, but her demeanor and manner of testifying appeared to raise some concerns about her credibility. She was both evasive and hesitant in answering questions, and, according to the trial court, her testimony was filled with long pauses, as demonstrated by the trial court's observation that A.S. took an average of two minutes to answer each question. The jury returned a verdict of not guilty on the aggravated kidnapping counts. On the sexual assault charges, the jury was hung, and the court declared a mistrial.

In early 2000, the state reinitiated its efforts to prosecute Cross, and the second trial was scheduled for March 29, 2000. During a March 20th status call with the trial judge, the prosecutor indicated that it had not been able to locate A.S. On March 28—a week later and the day before the second trial was to begin—the state filed a motion to declare A.S. unavailable and to use her

earlier testimony at Cross's second trial. The state described its investigation into A.S.'s whereabouts as follows: On March 3, an investigator interviewed A.S.'s mother and brother, neither of whom knew where A.S. was. A.S.'s mother also conveyed to the investigator that A.S. was "very fearful and very concerned" about testifying again. The investigator interviewed A.S.'s father on March 9 or 10, and he said he knew nothing about A.S.'s whereabouts. The investigator also checked the county hospital, jail, and morgue.

The state also reported in its motion that it learned from A.S.'s mother on March 10 that A.S. had left home the day before and had not returned. At this point, the state's attorney's office enlisted the help of a detective and a victim's advocate to help locate A.S. The detective duplicated many of the previously unsuccessful search efforts, including visiting the residences of A.S.'s mother and father. On one visit, the mother informed the detective that A.S. could be staying with an ex-boyfriend in Waukegan, Illinois, a city located forty miles north of Chicago. When the detective went to the Waukegan address, the ex-boyfriend's mother informed him that she had not seen A.S. in several months and that A.S. was not staying with her or her son. During another visit to A.S.'s mother's home, A.S.'s mother advised the detective that A.S. had called her two weeks earlier and told her that she did not want to testify and would not return to Chicago. The victim's advocate also called A.S.'s mother, who told the advocate that A.S. might be with an ex-boyfriend in Waukegan and that A.S. was enrolled in cosmetology school in another city. Cross then objected to the state's motion to declare A.S. unavailable, arguing that the state had not acted in good faith and had not made all feasible efforts to locate A.S.

such as looking into certain prominent places that A.S. allegedly frequented. Cross also argued that A.S.'s absence was temporary and did not amount to unavailability. Finding that the state had acted in good faith and expended reasonable efforts to locate A.S., the trial court granted the state's motion to substitute A.S.'s testimony from the first trial at Cross's retrial.

At Cross's second trial, a law clerk from the state's attorney's office read A.S.'s testimony into the record. The law clerk's rendition did not reflect A.S.'s hesitance or lengthy pauses from the first trial, and at times, the law clerk spoke with an inflected tone of voice. When Cross objected to the law clerk's "acting," the trial court instructed the state to "tell her to answer the questions [because] there's a slight inflection on some of her answers." At the conclusion of the trial, the jury returned a verdict of guilty of two counts of sexual assault, and not guilty of aggravated sexual assault. The trial court sentenced Cross to 30 years' imprisonment for each count to be served consecutively.

On direct appeal to the Illinois appellate court, Cross challenged several aspects of his conviction, including the trial court's suppression of evidence relating to A.S.'s alleged prostitution and drug use and the state's use of the transcript of her former testimony, which Cross argued was a violation of his Sixth Amendment right to confrontation. Although the appellate court "acknowledge[d] concerns" about the absence of live testimony—particularly where the absent witness is the sole eyewitness whose credibility may be crucial—the appellate court affirmed the trial court's finding that A.S. was unavailable based on her apparent desire to avoid being located. The appellate court also agreed

with the trial court's determination that the state had met its burden of demonstrating that it engaged in a good faith diligent search to locate A.S., ultimately affirming Cross's conviction and sentence.

The Illinois Supreme Court denied Cross leave to appeal, and Cross filed a petition for a writ of certiorari in the Supreme Court of the United States. After briefing by both parties, the Supreme Court denied the writ. Cross then filed a 28 U.S.C. § 2254 petition with the district court in which he raised Sixth Amendment and due process challenges to several of the trial court's evidentiary rulings, including its finding that A.S. was unavailable. The district court rejected these arguments and denied the petition, finding in part that Cross had failed to demonstrate that the state courts' findings concerning A.S.'s unavailability were an unreasonable application of federal law. Cross now appeals from the district court's denial of his habeas petition and raises only one issue for our review—whether the state appellate court reasonably applied federal law in its determination that A.S. was unavailable and that the state made a good faith effort to find her.

II. ANALYSIS

In an appeal from a ruling on a petition for habeas relief, we review the district court's findings of fact for clear error and its rulings on issues of law de novo. *Bintz v. Bertrand,* 403 F.3d 859, 865 (7th Cir. 2005). To qualify for habeas relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Cross must show that the state court proceedings adjudicating his claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Nonetheless, the Supreme Court has held that certain hearsay statements, including former testimony of an unavailable declarant, may be admissible without running afoul of the Sixth Amendment. *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980) ("[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'"); *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (holding that a witness is not unavailable unless the government can demonstrate a good faith effort to obtain the witness's presence at trial).[2] We find that the

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[2] The Supreme Court modified *Roberts*'s reliability requirement in *Crawford v. Washington*, 541 U.S. 36, 68 (2004), where the Court held that the Sixth Amendment demands unavailability and a prior opportunity for cross-examination. Despite the current precedent, we must analyze Cross's claims under *Roberts* and its progeny because that was the precedent at the time of the relevant state court decision. *See Teague v. Lane*, 489 U.S. 288, 301 (1989) (prohibiting analysis of reasonableness of state court determination under a "new" Supreme Court rule propounded after state court made its decision); *Bintz*, 403 F.3d at 865-67 (explaining that *Crawford* constitutes "new" Supreme Court precedent under *Teague* and should not be applied retroactively).

Illinois appellate court accurately laid out the applicable law governing unavailability even though it did so largely in terms of state rather than federal law. *See Early v. Packer*, 537 U.S. 3, 8 (2002) ("Avoiding these pitfalls [of contradicting federal law] does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.") (emphasis in original). Thus, although the state appellate court did not cite to any Supreme Court case, the standard it applied regarding the good faith effort requirement was identical to that of *Roberts*.

The central question on appeal is whether the state appellate court unreasonably applied Supreme Court precedent when it affirmed the trial court's unavailability determination. In order to satisfy the Sixth Amendment, the state must have acted in good faith to obtain the declarant's presence, and good faith requires undertaking diligent and reasonable measures. *Roberts*, 448 U.S. at 74-75. The requirement is "not that the government must do everything it can to get a witness to testify, only that it make a reasonable, good faith effort to get the witness into court." *United States v. Reed*, 227 F.3d 763, 767 (7th Cir. 2000). Ultimately, the "question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Roberts*, 448 U.S. at 74. On the other hand, a "witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber*, 390 U.S. at 724-25.

The state appellate court found that the state's investigation demonstrated that the state "undertook

an extensive search for A.S., including traveling to Waukegan. It engaged two of its own employees as well as a detective to locate A.S." We are unconvinced by this reasoning, as a forty-mile drive and the recruitment of two employees does not render the search "extensive," particularly where neither the Waukegan trip nor the extra help appeared to add much value. The extent of the detective and advocate's assistance was to repeat the same investigative strategies that had proven unsuccessful for the state's investigator, including going to the residences of A.S.'s parents and inquiring about A.S.'s presence with the county jail, hospital, and morgue. Indeed, the bulk of the state's investigation into A.S.'s whereabouts consisted of talking to her family members, which is insufficient to satisfy the Confrontation Clause here. *See United States v. Hite*, 364 F.3d 874, 882-83 (7th Cir. 2004) (affirming district court's conclusion that defendant had not made reasonable efforts to locate witness when sole attempt to contact witness was talking to his family members despite other available means to locate witness). And the fact that the investigator and detective contacted state departments where there was little likelihood of finding A.S. (e.g., contacting the morgue despite being told by A.S.'s mother that she had spoken to her recently and simply did not know her exact whereabouts) does not establish the state's good faith. *See Roberts*, 448 U.S. at 74 ("The law does not require the doing of a futile act.").

The only new information secured by the detective and advocate concerned the ex-boyfriend in Waukegan and A.S.'s enrollment in beauty school, neither of which were noteworthy or particularly helpful to the investigation. While the detective drove to the ex-

boyfriend's house in Waukegan, it does not appear that any effort was made to contact A.S.'s current boyfriend—whom she was with just moments before the alleged assault—or any of her other friends in the Chicago area. And with respect to the beauty school, there is no indication that the advocate or the detective (to whom the advocate passed along the information) asked for the name or location of the school, much less made any attempt to contact the school to inquire about whether anyone had seen A.S. In our view, the state's failure to investigate these leads does not comport with a showing of reasonable good faith.

Given the importance of A.S.'s testimony, the state was obligated to exert great effort to locate her. "The more important the witness to the government's case, the more important the defendant's right, derived from the Confrontation Clause of the Sixth Amendment, to cross-examine the witness." *United States v. Foster*, 986 F.2d 541, 543 (D.C. Cir. 1993). And as the Tenth Circuit has explained, "the more crucial the witness, the greater the effort required to secure his attendance." *Cook v. McKune*, 323 F.3d 825, 835-36 (10th Cir. 2003); *see also United States v. Mann*, 590 F.2d 361, 367 n.6 (1st Cir. 1978) ("A lesser effort might be reasonable where the testimony goes to minor, collateral, or uncontested matters."). A.S.'s testimony here was crucially important to the state's prosecution, as she was the complainant and sole witness. And the importance of her live testimony is underscored by the apparent credibility issues from Cross's first trial. As the Supreme Court has recognized, the jury's ability to evaluate a witness's demeanor via live testimony is the foremost concern of the Confrontation Clause. *See Barber*, 390 U.S. at 721 ("[T]he primary object of [the

Confrontation Clause is to afford the accused] . . . an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."). Here, A.S.'s testimony at the first trial was pause-filled and evasive, which may have adversely affected the jury's impression of her, as is perhaps demonstrated by the verdict of not guilty on the kidnapping count and the lack of a verdict on the sexual assault counts. The questions surrounding A.S.'s demeanor and credibility thus became the gravamen of the second trial. And without her live testimony, the second jury was forced to make a credibility determination based on the cold transcript, which it could not objectively do, particularly given the law clerk's more fluid and inflected reading of the transcript.

In light of A.S.'s importance as a witness, the state should have taken other proactive measures to secure her presence at the second trial, particularly given that the state had ample notice of A.S.'s tremendous reluctance to testify again. A.S. had expressed her fears about testifying as early as the conclusion of the first trial, at which point she indicated that she was scared to testify again, but eventually agreed to do so. As of March 3 (26 days before Cross's second trial was to begin), the state knew that there was little chance of A.S. testifying: The state's investigator who had gone to A.S.'s residence could not locate her and was told by A.S.'s mother that A.S. was "very fearful and very concerned" about testifying again. Even after receiving this information, the state took no additional steps to

locate A.S. until March 10, when A.S.'s mother informed the state's attorney's office that she had apparently run away the day before.

"If there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." *Burns v. Clusen*, 798 F.2d 931, 937 (7th Cir. 1986). One such measure available to the state was to subpoena A.S. immediately after it learned of her reluctance to testify. We do not believe that the state is required to subpoena every reluctant witness in order to adhere to the Sixth Amendment, but, here, where A.S. was a critical witness and the state had ample notice of her reluctance to testify and her proclivity to disappear without informing anyone of her whereabouts, the state should have issued a subpoena to secure A.S.'s presence at the second trial. Supreme Court precedent supports the use of such a court process to obtain the presence of certain material witnesses. *See Roberts*, 448 U.S. 56 (finding unavailability after witness disregarded five subpoenas to appear in court); *Barber*, 390 U.S. 719 (finding that state's failure to attempt to utilize court process to secure presence of witness incarcerated in federal prison violated habeas petitioner's Sixth Amendment rights); *Berger v. California*, 393 U.S. 314 (1969) (finding that state's failure to subpoena witness and defendant's lack of opportunity to cross-examine witness violated defendant's Sixth Amendment rights). We have held that the government's use of subpoenas or material witness arrest warrants is strong evidence of good faith. *See, e.g., United States v. Ochoa*, 229 F.3d 631, 637 (7th Cir. 2000) (finding that government's search for witness—including securing material witness arrest warrant and interviews with his employer,

landlord, and other individuals—constituted a reasonable, good faith effort).

We do not lightly reach our conclusion that the state court unreasonably applied federal law, but under the circumstances of this case, where A.S.'s testimony was critical and the state neglected to subpoena her despite knowing that she was extremely reluctant to testify, we find that the state did not sufficiently demonstrate that it acted in good faith. Similarly, the state's duplicative efforts and its failure to more thoroughly investigate were also insufficient to protect Cross's Sixth Amendment rights. As such, the state trial court and appellate court unreasonably applied federal law in determining that A.S. was unavailable.

III. CONCLUSION

We REVERSE the judgment of the district court. The writ of habeas corpus is GRANTED unless the State of Illinois elects to retry Cross within 120 days of issuance of this court's final mandate, or of the Supreme Court's final mandate.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

UNITED STATES OF AMERICA EX REL IRVING CROSS, PETITIONER	)	No. 05 C 5692
v.	)	The Honorable William J. Hibbler
TERRY MCCANN[1], Respondent.	)	

MEMORANDUM OPINION AND ORDER

Irving Cross petitions this Court under 28 U.S.C. § 2254, arguing that his conviction violates the United States Constitution. For the reasons stated herein, the Court DENIES Cross's petition.

I. Procedural Background[2]

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[1] Terry McCann is currently the Warden at the Stateville Correctional Center, where Cross is incarcerated, and is thus the proper respondent in this *habeas* action. *See* Rule 2(a) of the Rules Governing *habeas corpus* cases under 28 U.S.C. § 2254. This court hereby substitutes Terry McCann as the respondent. *See* Fed. R. Civ. P. 25(d)(1).

[2] Cross has done nothing to suggest that the Illinois courts' factual findings are incorrect. Consequently, the Court presumes them to be correct and derives the following facts

Chicago police arrested Irving Cross on August 6, 1998 at 4:50 a.m. for the sexual assault of 19-year-old A.S. that allegedly occurred at knife point thirty minutes prior to the arrest. Cross then faced an indictment charging him with multiple counts of aggravated criminal sexual assault, criminal sexual assault, aggravated kidnapping, and kidnapping. Cross claimed that A.S. consented to the sexual contact.

Prior to trial, the state moved to preclude Cross from mentioning or asking any witness about a statement A.S. made to a doctor admitting that "she had been a hooker." The state trial court granted the motion, ruling that the rape shield statute, 725 ILCS 5/115-7, barred the statement and that the allegation regarding A.S.'s prior prostitution was not relevant to whether A.S. consented to sex. The state also moved to prevent Cross from asking about A.S.'s statement to the doctor that "she has used rock cocaine." The state trial court again granted the state's motion, though it granted Cross leave to present evidence (if he had any) that cocaine use on the day of the incident impacted A.S.'s ability to observe and recollect. Finally, the state moved to preclude Cross from mentioning his statement to the police at the time of his arrest, in which he alleges that he gave A.S. $10 to buy crack cocaine, which they smoked together shortly before having consensual sex. The state trial court also granted this motion.

After a November 1999 jury trial, the jury returned a verdict of not guilty on the aggravated kidnapping

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from the Illinois Appellate Court's opinion. *Araujo v. Chandler*, 435 F.3d 678, 682 (2005).

counts. The jury, however, was unable to reach a verdict on the remaining counts. The state trial court thus declared a mistrial on the remaining counts. The state informed A.S. and her mother that the first trial had ended in a mistrial and that A.S. would need to testify again at the second trial. A.S. indicated that she would testify again, and nothing in the assistant state's attorney's contacts with A.S. in the interim between the two trials indicated that A.S. would refuse to testify in the second trial.

But at a March 20, 2000 status call, the state informed the trial court that it had been unable to locate A.S., its principal witness, and it later moved to present her prior testimony at the second trial. The Illinois Appellate Court's opinion does not make entirely clear precisely when A.S. disappeared. On the one hand, the court reports that the assistant state's attorney learned on March 10 that A.S, had left home "the day before and had not returned." (Resp. Ex. D. at 10). Later, the court reports that an investigator for the state's attorney's office went to A.S.'s mother's home on March 3 in a failed effort to locate her. (Resp. Ex. D. at 10). These two findings contradict each other, though neither the petitioner nor the respondent calls this Court's attention to the inconsistency. In the end, however, neither party disputes the state court's factual findings regarding the efforts the state undertook to locate A.S.

At the hearing on the state's motion, the state presented three witnesses: Mary Ember, an investigator for the state's attorney's office, Allen Jaglowski, a Chicago police detective, and Claudia Morales, a victim-witness advocate. All three had attempted,

throughout March 2000, to locate A.S. Ember spoke with A.S.'s mother, A.S.'s brother, and A.S.'s father (who did not live with A.S .'s mother). None of the three knew where A.S. was, and A.S.'s mother told Ember that A.S. was "very fearful and very concerned" about testifying again. Ember also repeatedly inquired at the medical examiner's office, "public health," the Cook County Hospital, the Cook County jail, the Illinois Department of Corrections, the Department of Public Aid, the Illinois Secretary of State, and the Immigration Department. Despite her inquiries, Ember was not able to locate A.S.

Jaglowski visited A.S.'s mother's home approximately every three days at different times of the day. Jaglowski also visited A.S.'s father's home. Like Ember, Jaglowski searched public data sources for appearances by A.S. Jaglowski investigated the medical examiner's office and the Department of Corrections. Finally, Jaglowski went to a friend of A.S., who lived in Waukegan, and spoke with the friend's mother, who informed him that she had not seen A.S. in several months and that A.S. was not staying with her or her son. On the morning of the hearing, Jaglowski made a final attempt to find A.S. at her mother's home, and A.S.'s mother told him that A.S. had "called her about two weeks" ago and that she had told A.S. that police were looking for her, A.S.'s mother reported to Jaglowski that A.S. had told her that "she was afraid and would not return to the city." A.S.'s mother could not provide Jaglowski a method of contacting A.S.

Morales learned from A.S.'s mother that she might be with an ex-boyfriend in Waukegan, but Morales was

unable to locate A.S. there.[3] A.S.'s mother also informed Morales that A.S. had enrolled in cosmetology school, but had not attended in some time.

The state trial court ruled that A.S. had made it impossible for the sate to locate her and that she did not want to be found. The state court further ruled that despite A.S.'s vanishing act, the state made "superhuman efforts" to locate her, which demonstrated good faith. Consequently, the state trial court allowed the state's attorney to employ a reader to read A.S.'s testimony from the first trial into the record at the second trial. The jury convicted Cross on two counts of sexual assault, though returned a verdict of not guilty on two counts of aggravated sexual assault.

Cross raised several issues in his direct appeal. Among these issues, Cross argued that the trial court erred in allowing the state to employ a reader to replicate A.S.'s testimony and that it erred in preventing him from mentioning A.S.'s statement to the doctor regarding her prior prostitution and crack cocaine use. The state appellate court noted that whether the state has demonstrated good-faith and reasonable diligence must be made "on a case-by-case basis after careful review of the facts and circumstances." (Resp. Ex. D at 48). The state appellate court held that the state had demonstrated that A.S.

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[3] The state appellate court's opinion does not discuss whether the "ex-boyfriend" in Waukegan and the "old friend" in Waukegan might have been same person. Neither the respondent nor the petitioner seems to have explored this detail, and the Court will draw no inferences from it.

was unavailable, that it had demonstrated good faith efforts to locate and produce A.S., and that Cross had an adequate opportunity to cross-examine her at the initial trial. The Illinois Supreme Court denied Cross's petition for leave to appeal and the United States Supreme Court denied to issue a writ of *certiorari*.

Cross then filed this *habeas* petition, raising three claims. Cross first argues that the state court's findings that A.S. was unavailable and that the state had made good-faith efforts to produce her are an unreasonable application of Supreme Court precedent and violate his Sixth Amendment confrontation rights. Cross next argues that the state court's application of the rape-shield statute to bar evidence of her statements relating to prostitution violate his constitutional right to present a defense. Cross finally argues that the presentation and misuse of A.S.'s testimony violate his Sixth Amendment confrontation rights and also violate due process.

II. Procedural Default

In order to raise a constitutional challenge to a state court conviction and sentence in a federal *habeas corpus* proceeding, a petitioner seeking *habeas corpus* relief must have fully and adequately presented his challenge to the state courts. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). In so doing, a petitioner must place both operative facts and controlling legal principles before the state court. *Badelle v. Cornell*, 452 F.3d 648, 661 (7th Cir.2006). Moreover, a petitioner must pursue a discretionary appeal to the state's highest court, in this case the Illinois Supreme Court, to avoid procedural default

barring federal *habeas corpus* review. *Boerckel*, 526 U.S. at 845; *Mahaffey v. Schomig*, 294 F.3d 907, 914-15 (7th Cir.2002). In other words, a *habeas corpus* petitioner must give the state courts "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Boerckel*, 526 U.S. at 845.

In addition, federal courts may not review constitutional claims where the state court decision relies upon an adequate and independent state procedural ground. *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); *Perry v. McCaughtry*, 308 F.3d 682, 690 (7th Cir.2002). For example, waiver is an adequate and independent ground under state law that can preclude federal *habeas* review. *Harris v. Reed*, 489 U.S. 255, 258, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

In the event of a procedural default, a petitioner can overcome the bar to federal *habeas* review if he can demonstrate: a) cause for the default and prejudice resulting from the constitutional errors or b) a fundamental miscarriage in justice, which in a non-capital case exists where the constitutional violation probably has resulted in the conviction of one who is actually innocent. *Wrinkles v. Buss*, 537 F.3d 804, 812 (7th Cir. 2008). To demonstrate cause, the petitioner must show that some factor external to the defense impeded his ability to comply with the state procedure. *Guest v. McCann*, 474 F.3d 926, 930 (2007).

The Respondent argues that Cross defaulted his third claim by failing to present it to the Illinois Supreme Court in his petition for leave to appeal The

Respondent notes that Cross made two Sixth Amendment arguments to the Illinois Appellate Court: 1) that the trial court's ruling on A.S.'s unavailability and the state's good-faith efforts to produce her violated his Sixth Amendment rights; and 2) even if the trial court's ruling on A.S.'s unavailability and the state's efforts did not violate his Sixth Amendment rights, the use of a reader to present an unavailable witness's prior testimony did. (See Resp. Ex. A at 38-51). In particular, Cross called to the Illinois Appellate Court's attention the reader's use of inflection to establish a false credibility and demeanor that A.S. lacked and the inability of the second jury to evaluate A.S.'s credibility and demeanor. The Respondent argues, however, that in his petition for leave to appeal to the Supreme Court, Cross complained only of the trial court's ruling regarding A.S.'s unavailability and the state's efforts.

In response, Cross suggests that he did present the claim in his petition for leave to appeal, pointing to two specific passages in the petition. First, Cross argues that the opening sentence alerts the Illinois Supreme Court to the claim concerning the use of reader to present an unavailable witness's prior testimony. There Cross states that "[this] petition raises the violations of . . . the Sixth Amendment right to confrontation when the trial court compels a defendant to testify in a front of a jury . . . and, simultaneously, authorizes the State to forego live testimony from the sole accuser and alleged victim." (Resp. Ex. E at 1), Second, Cross points to the opening sentence of the argument itself. There, he states that the "Court should address and find that no substitute for the complainant's live testimony was constitutionally or statutorily permissible, where the State, having obtained no benefit from the

complainant's demeanor at the hung jury . . . did not attempt in good faith to secure the complainant's reluctant but available testimony for the second trial, and where the second jury was prevented from evaluating the demeanor and the arrest record of the missing accuser." (Resp. Ex. E at 14). Cross goes on to discuss the problems created by the trial court's decision to allow the State to employ reader to present A.S.'s prior testimony. (Resp. Ex. E at 15).

Although Cross presented the first and third claims of his *habeas* petition as a single claim before the Illinois Supreme Court, all of the arguments that he makes here were presented to both the Illinois Appellate Court and the Illinois Supreme Court. The Court therefore holds that he has not defaulted his third claim.

III. Discussion

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) sets forth the standard under which federal courts review *habeas* claims. 28 U.S.C. § 2254(d). Under the AEDPA, a court may grant a *habeas corpus* petition only where the state court's judgment is "contrary to" or "an unreasonable application of" clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1); *Simonson v. Hepp*, 549 F.3d 1101, 1105 (7th Cir. 2008). A state court decision is "contrary to" Supreme Court precedent if it applies a rule that conflicts with that precedent or reaches a different result on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision is an "unreasonable application" of Supreme Court precedent

if it correctly identifies the governing legal principle but unreasonably applies it to the facts of the case before it. *Id.* This requires more than a showing that the state court decision is incorrect; it must be unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

A. A.S.'s Unavailability and the State's Efforts to Locate Her

The Confrontation Clause of the Sixth Amendment guarantees the right of the accused to "be confronted with the witnesses against him." U.S. Const. Amendment VI. The United States Supreme Court, however, has held that the Sixth Amendment confrontation clause permits the admission of certain hearsay statements, including the former testimony of an unavailable declarant, against a defendant despite the defendant's inability to confront the declarant at trial. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).[4]

Barber holds that a witness is not "unavailable"

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[4] The Supreme Court has recently modified the standard set forth in *Barber* and *Roberts*. *See Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. Wd 177 (2004). The Supreme Court announced *Crawford* after Cross filed this *habeas* petition and did not indicate that district courts were to apply its holding retroactively. *See Bintz v. Bertrand*, 403 F.3d 859, 865-67 (7th Cir. 2005). Thus, for the purposes of this Court's review of Cross's petition, it must apply the standard set forth in *Barber* and *Roberts*.

unless the government demonstrate that it has made a good-faith effort to obtain a witness's presence at trial. *Barber*, 390 U.S. at 724-25, 88 S.Ct. at 1322. *Roberts* clarifies that the question of whether the government has undertaken a good-faith effort is one of reasonableness. *Roberts*, 488 U.S. at 74-75, 100 S.Ct, at 2543. The law does not require the government to undertake futile acts, and so where there is no possibility that affirmative measures might procure the witness, "'good faith' demands nothing of the prosecution." *Id.*

Cross argues that the state court failed to consider the "totality of the circumstances" when determining that A.S. was unavailable. In particular, Cross argues that the state court should have considered A.S.'s demeanor during her initial testimony, the voluntary nature of A.S.'s absence, and the seriousness of the charges Cross faced to require the state to meet a higher burden in order to demonstrate a good-faith effort. With regard to the state's effort, Cross points to two failures that demonstrate the state's failure to make a reasonable effort to obtain A.S.'s testimony. First, Cross argues that the state's failure to subpoena A.S., in light of her hesitancy to testify, demonstrates its effort in obtaining A.S.'s testimony was not in good-faith. Second, Cross argues that the state's search for A.S., in light of the proceeding factors, was not sufficiently extensive to constitute a good-faith effort. The Court disagrees.

The Illinois Appellate Court noted that the admission of the prior testimony of an unavailable witness poses confrontation clause problems, but that these problems may be overcome with a proper

demonstration of unavailability. Although the state court did not cite to Supreme Court precedent, it articulated the standard set forth in *Barber* and *Roberts*. The state court observed that the party seeking admission of prior testimony must demonstrate that the witness is unavailable to testify, that it made a reasonably diligent, good-faith effort to produce the witness, and that the opposing party had an adequate opportunity to cross-examine the witness at the prior hearing.[5] The state court further noted that whether the state has made a good-faith effort must be determined on a case-by-case basis after a review of the facts and circumstances. Contrary to Cross's argument, the state articulated the proper standard.

The state appellate court then proceeded to discuss the state's efforts. First, the court dispensed with the notion that merely because A.S. was the victim in a sexual assault proceeding that her prior testimony would be inadmissable. The court discussed the fact that A.S.'s demeanor could not be discerned from the transcript of her prior testimony, but held that despite these concerns her prior testimony still could be admissible if the state had demonstrated that A.S. was, in fact, unavailable and that it had made a good-faith effort to produce her for the second trial. Cross points to nothing that demonstrates that the state appellate court's holding was an unreasonable application of Supreme Court precedent.

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[5] Indeed, the Illinois Appellate Court set forth the standard as modified by *Crawford*, which requires an adequate opportunity to cross-examine.

Cross argues that the state should have been compelled to keep A.S. under subpoena in order to demonstrate good faith. The state appellate court rejected this argument, and its holding is not an unreasonable application of Supreme Court precedent. Cross points to *Berger v. California* in support, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969). But *Berger* did not hold that state officials must issue subpoena if they have doubt that the witness may later refuse to testify. *Berger*, 393 U.S. at 314-15. In *Berger*, the Court merely held that *Barber* should be given retroactive application. *Id.* Instead, Courts have consistently rejected the argument that the Confrontation Clause requires prosecutors to issue subpoena or take other proactive measures when a witness appears to be hesitant to testify at trial. *See Lowery v. Anderson*, 225 F.3d 833, 840 (7th Cir. 2000) (*superseded by statute on other grounds as stated in Corcoran v. Buss*, 551 F.3d 703 (7th Cir. 2008) (declining to impose a rule on prosecution to threaten reluctant witness who invoked Fifth Amendment right with prosecution prior to finding of unavailability); *Lor v. Jenkins*, 2006 WL 1153778, * 2 (7th Cir. Apr. 6, 2006) (holding that prosecutor not required to detain or monitor a witness who expressed hesitancy to testify in order to demonstrate good-faith); *Gonzales v. Scully*, 578 F. Supp. 1063, 1071 (S.D.N.Y 1984) (declining to find that good-faith required prosecutor to prevent witness from becoming unavailable). Moreover, A.S. testified despite her fear at least once and thereafter told prosecutors that she was willing to testify a second time. Therefore, given A.S.'s demonstrated willingness to testify, the state had no apparent reason to keep her under subpoena. Clearly, the state court's decision does not lie well outside the boundaries of permissible differences of

opinion.

Cross also argues that the state took insufficient measures to locate A.S, once it learned of her absence, complaining both about the length of its search and the procedures it employed. The state appellate court described the efforts the state undertook to locate A.S., including numerous contacts with her mother and father, a trip to Waukegan to visit the home of a friend she had been known to stay with, searches of relevant state and county databases, the use of two investigative employees and a detective. Cross argues that the state appellate court's conclusion is an unreasonable application of Supreme Court precedent because the state could have done more.

Investigators could always investigate other leads, but the Constitution does not require the state to pursue increasingly improbable leads in perpetuity. It requires reasonableness. The state undertook significant efforts to locate A.S., despite her declared intention not to return to the city and her refusal to inform even her mother of her whereabouts. It sent two employees to family member's and friends' homes over a course of weeks. It scanned public records in an effort to locate A.S. And it asked the police to assist in their search, but the police search was also unsuccessful. Courts have found comparable endeavors to demonstrate good-faith. *See, e.g.*, *Lor*, 2006 WL 1153778 at *2 (collecting cases); *Flournoy v. McKune*, 2008 WL 467015, *4-5 (10th Cir. Feb. 20, 2008); (*James v. Yarbrough*, 2007 WL 1492888, * 1 (9th Cir. May 21, 2007). Cross cannot demonstrate that the Illinois Appellate Court's decision regarding the intensity of the state's search lies so far out of the mainstream of

judicial opinions that it is unreasonable.

Finally, Cross argues that because A.S.'s absence was voluntary the state court should have found that she was not unavailable. In support, Cross points to *Motes v. United States* and *Garcia-Martinez v. City & County of Denver*, among others. Cross's reliance again is misplaced. In *Motes*, the government intended to rely upon the testimony of a co-defendant. 178 U.S. 458, 20 S.Ct. 993 (1900). The witness, William Robert Taylor, was in the custody of the government, and supposedly held in jail without bail after pleading guilty. *Id.* Somehow, prior to trial, a prosecuting official decided to allow another witness to take custody of Taylor and allow him to stay the night before the trial in a hotel. *Id.* Miraculously, Taylor showed up at the courthouse the day of the trial, but just before the trial was to begin, he went on the lam. *Id. Motes* concerns a factual pattern so remote from the one of the present case that it is not instructive in the least. *Garcia-Martinez* is similarly uninstructive. *Garcia-Martinez* concerns a plaintiff who intentionally left the jurisdiction and then attempted to present his own deposition testimony in place of live testimony. 392 F.3d 1187 (10th Cir. 2004). The court's refusal to allow a plaintiff to make an end run around procedural rules does not speak to the state's inability to locate one of its witnesses. In fact, contrary to Cross's argument, courts have treated a witness's evasive behavior as a factor *in favor* of unavailability, rather than against it. *See Ewing v. Winans,* 749 F.2d 607, 611-12 (10th Cir. 1984).

The Court holds that the state court's conclusion that the state exercised good-faith in its efforts to locate A.S. was not an unreasonable application of Supreme

Court precedent.

B. Rape-Shield Statute

Cross argues that the Illinois court's application of the state's rape-shield statute violates his Sixth Amendment rights, citing *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct., 480, 102 L.Ed. 2d 513 (1988). The Sixth Amendment, however, does not establish an absolute right to present favorable witnesses. *Hammer v. Karlen*, 342 F.3d 807, 811 (7th Cir. 2003) (citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974), *Olden v. Kentucy*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed. 2d 513 (1988), and *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). Insofar as the Confrontation Clause and the right to compulsory process is concerned, trial judges retain wide latitude to impose reasonable limits upon defense counsel's cross-examination or presentation of favorable witnesses. *Dunlap v. Hepp*, 436 F.3d 739, 741-42 (7th Cir. 2006); *Hammer*, 342 F.3d at 811. Thus, all the Constitution requires is that courts "give earnest consideration to the possibility that excluding evidence under a rape shield law may interfere unduly with the defendant's opportunity to present a defense of innocence." *Pack v. Page*, 147 F.3d 586, 589 (7th Cir. 1998); *see also Davis v. Hulick*, 553 F. Supp. 2d 993 (N.D. Ill.2008).

The Illinois Appellate Court did precisely that. Although the court did not identify the Supreme Court precedent, it recognized the potential of Illinois's rape-shield statute would interfere with Cross's right to present a defense. It then reasoned that A.S.'s *prior* prostitution was not highly probative with regard to the

question of whether A.S. engaged in prostitution (and therefore possibly consented) to sex on the date of the incident. The court employed similar reasoning with regard to A.S.'s statement concerning drug use. Moreover, the court reasoned that A.S.'s statements did not tend to demonstrate unique or distinctive conduct: nothing suggested A.S. exchanged drugs for sex in the past and instead her statements revealed only that she had used drugs and had been a prostitute. The court also noted that nothing prevented Cross from presenting his defense that the sex was consensual through his own testimony, but that he chose not to do so. It is clear that the Illinois court carefully weighed Cross's argument regarding A.S.'s prostitution, concluded that it was not so probative that the rape-shield statute interfered with his right to present a defense, and therefore applied the plain language of the statute. The Constitution does not require more. *Pack,* 147 F.3d at 589.

In short, the Illinois court addressed the right issue and arrived at a reasonable conclusion.

C. Presentation and Misuse of A.S.'s Testimony

Cross's final argument merits little discussion. Cross seems to argue that the circumstances surrounding the admission of Cross's deposition testimony are so unreasonable and untrustworthy that even if the state had made a good-faith effort to locate her, it should have been excluded. Cross suggests that the fact that A.S.'s demeanor during her initial testimony was so untrustworthy that, given the fact that she was the state's principle witness, due process required that the state court prevent the prosecutor from reading her

testimony into the record at the second trial. The Supreme Court consistently has upheld the principle that the prior testimony of a witness is admissible in subsequent court proceedings if the witness is unavailable and subject to cross-examination at the prior proceeding. No Supreme Court precedent requires additionally that a trial court find that a witness testified credibly at the first proceeding. Neither *Barber* nor *Crawford* carve out exceptions to this general principle. Therefore, Cross cannot demonstrate that the Illinois court's refusal to bar A.S.'s testimony based upon an alleged lack of credibility is an unreasonable application of Supreme Court precedent.

The Court DENIES Thurmond's petition for a writ of *habeas corpus*. IT IS SO ORDERED.

Dated: 2/10/09

Hon. William J. Hibbler
United States District Court

APPENDIX C

Supreme Court of the United States

Irving CROSS, petitioner,
v.
ILLINOIS.
No. 03-8407.

Oct. 4, 2004.

Case below, 337 Ill.App.3d 1153, 300 Ill.Dec. 252, 843 N.E.2d 510.

Petition for writ of certiorari to the Appellate Court of Illinois, First District, denied.

APPENDIX D

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Illinois Dispositions of Petitions for Leave to Appeal".)

Supreme Court of Illinois

People
v.
Irving Cross

No. 96521

SEPTEMBER TERM, 2003
October 07, 2003

Lower Court: No. 1-00-2006

Disposition: Denied.

APPENDIX E

SECOND DIVISION
March 31, 2003

No. 1-00-2006

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 98 CR 23627
IRVING CROSS, Defendant-Appellant.	)	Honorable Stanley Sacks, Judge Presiding.

ORDER

Following a jury trial, defendant Irving Cross was found not guilty of aggravated kidnaping. Because the jury was unable to reach a verdict as to two counts of aggravated criminal sexual assault and two counts of criminal sexual assault, it was discharged and a mistrial declared. Following a second jury trial, defendant was found guilty of two counts of criminal sexual assault and not guilty of two counts of aggravated criminal sexual

assault. Thereafter, defendant was sentenced to 30 years' imprisonment on each of his convictions, to be served consecutively. On appeal, defendant contends that the trial court erred: (1) in requiring him to testify prior to rendering a ruling as to whether his prior convictions could be used against him as impeachment evidence; (2) in finding that the complaining witness, A.S., was unavailable, that the State used diligence and exercised good faith in attempting to locate her and, therefore, in allowing the State to read her testimony from his first trial at his second trial; (3) in allowing a law clerk from the State's Attorney's office to read A.S.' testimony at his second trial; (4) in barring him from using A.S.' statements to the doctor who examined her following the alleged incident that "she had been a hooker up until last week" and that she "had used rock cocaine" as impeachment evidence; (5) in barring him from using A.S.' three prior arrests as impeachment evidence; and (6) in refusing to instruct the jury on his defense of consent. Defendant also contends that retrial on the charges of criminal sexual assault and aggravated criminal sexual assault was barred by the double jeopardy rule, his sentences were excessive, and his sentences were illegal because they involved double enhancement. For the reasons set forth below, we affirm.

STATEMENT OF FACTS

Defendant was arrested on August 6, 1998, at 4:50 a.m. for the sexual assault of 19-year-old A.S. that allegedly occurred at knife point at approximately 4:20 a.m. that day. Thereafter, he was indicted on 12 counts of aggravated criminal sexual assault, 4 counts of criminal sexual assault, 2 counts of aggravated kidnaping, and 2 counts of kidnaping. On October 29,

1999, prior to the start of defendant's first trial, defendant filed his answer to pretrial discovery, asserting a consent defense. In addition, the trial court entertained arguments on various motions *in limine*. Because these motions were also presented at defendant's second trial and the trial court relied on the same reasoning in ruling on them at that time, they are set forth here.

First, the State filed a motion *in limine* to preclude defendant from mentioning or asking any witness about a statement contained in a report authored by Dr. Richard Schmitt, the doctor who examined A.S. subsequent to the incident, that she told him "she had been a hooker up until last week." The court allowed the State's motion, concluding that the statement was barred by statute, commonly referred to as the rape shield statute (725 ILCS 5/115-7 (West 1998)), and that any alleged prior prostitution was not relevant to whether A.S. consented to sex with defendant on August 6.

The State also filed a motion *in limine* to preclude defendant from mentioning or asking any witness about A.S.' statement, in the same report authored by Dr. Schmitt that she "has used rock cocaine." The trial court allowed the State's motion, but stated that defendant could present evidence, if he had it, that A.S. used cocaine on the day of the incident or the day before since this would be relevant to her ability to observe and recollect the incident.

The State also filed a motion *in limine* to preclude defendant from mentioning any statements he made to

the police at the time of his arrest,[1] which the trial court subsequently allowed.

Lastly, the State filed a motion *in limine* to preclude defendant from presenting evidence of A.S.' arrests subsequent to the incident. After the incident, A.S. had been arrested and charged for criminal trespass to a vehicle, which was later SOL'd, for retail theft, also later SOL'd, and again was arrested for criminal trespass to a vehicle, the disposition of which, if any, was unknown. The trial court questioned the State with respect to these arrests, specifically inquiring whether it had made any deals with A.S. The State responded in the negative, stating that it was not even aware of her arrests until defendant raised them. The trial court subsequently allowed this motion.

In connection with the above rulings, the trial court denied a motion *in limine* by defendant to introduce A.S.' August 6, 1998, statements to Dr. Schmitt, as well as a motion *in limine* by defendant to introduce his August 6 statement to the police.

Defendant also filed a motion *in limine*, pursuant to *People v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695

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[1] According to defendant's August 6, 1998, statement to the police, he was walking around when he saw a female at a bus stop. She called him over and they spoke. Defendant then gave her $10 to buy crack, which she did, and the two of them smoked it in the backyard of an abandoned house. Defendant then had sex with the female, but denied having oral sex with her. Defendant also denied that he had put a knife to her neck. Defendant further stated that, as he was walking away, the female asked him for a ride and then followed him.

(1971),[2] to bar the use of his prior convictions for aggravated criminal sexual assault and possession of a controlled substance as impeachment evidence, in which defendant specifically alleged that the court's denial of the motion would abridge his consideration of whether to testify. Because this motion is at issue in this appeal, the events from defendant's first trial that are related to the motion are set forth here. Defendant specifically asked for a ruling on the motion prior to the start of trial, to which the trial judge responded, "I will probably do that," but stated, pursuant to case law, an advance ruling was not required.

Jury selection in defendant's first trial on four counts of aggravated criminal sexual assault, two counts of criminal sexual assault, one count of aggravated kidnaping, and one count of kidnaping took place on November 1, 1999. On November 2, prior to testimony, the court entertained defendant's motion *in limine* to bar the use of his prior convictions for impeachment purposes. The trial court stated that, based on the case law it had reviewed, it would defer a ruling until

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[2] In *Montgomery*, the supreme court adopted the then-proposed Federal Rule of Evidence 609. The *Montgomery* rule provides that a prior conviction is admissible against a witness, including a defendant, for the purpose of impeachment, if the crime: "(1) was punishable by death or imprisonment in excess of one year, or (2) involved dishonesty or false statement regardless of the punishment, unless (3) in either case, the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice." *Stokes v. City of Chicago*, 333 Ill. App. 3d 272, 278, 775 N.E.2d 72 (2002).

defendant chose to testify. The court further stated that it need not rule at this time because it could not tell exactly what defendant's testimony would be; thus, any ruling would be premature. Defense counsel argued that he had asked in the past and was again asking for an advance ruling so that the defense team could decide whether defendant should testify. Counsel indicated that the court's decision would have a "very big impact" on whether defendant would testify and that defendant felt he needed to testify. The court responded that, while defendant may state that he would testify, he could change his mind and, as such, any ruling would be premature. The court also reiterated that defendant must testify first and then it would conduct the *Montgomery* balancing test and render a ruling.

The State presented its witnesses at defendant's first trial. At the close of the first day of testimony, defense counsel again sought a ruling on its motion to bar use of defendant's prior convictions because the defense needed to decide whether defendant would testify or not and, if he did, whether the defense should front the convictions, *i.e.*, bring the convictions out on direct examination of defendant rather than on cross-examination. The trial court again stated that the law did not require a ruling prior to the time a defendant testifies. According to the court, once defendant finished testifying, both on direct and cross-examination, it would render a ruling on whether defendant's prior convictions would be admissible. Defense counsel argued that this procedure would deny defendant the ability to front the convictions and it would look to the jury like the defendant was trying to hide something. The court responded that, should it determine defendant's prior convictions were

admissible, it would allow defense counsel to front the convictions on re-direct examination. The next day, the State presented its final witness and then rested. Defendant's counsel then moved for a directed finding or motion for acquittal, which the trial court denied.

Following a recess, defense counsel apprised the court that he had advised defendant to testify, but defendant chose not to do so. The trial court admonished defendant with respect to his right to testify and defendant stated that he was making his decision not to testify freely and voluntarily. Defense counsel then advised the court that defendant chose not to testify because there had been no ruling on the admissibility of his prior convictions and defendant did not want to take the chance that the court would later allow them to be admissible since defendant felt the prior convictions would be devastating to his case. The trial judge reiterated that the "law does not require me to let you know in advance what my ruling is." Following a jury instruction conference, defendant rested.

Both parties then presented closing arguments. Following instructions to the jury, the jury retired at approximately 1 p.m. At 7:25 p.m., the jury sent a note to the trial judge, stating that it could not come to a unanimous decision on all charges; it was at an impasse. After the trial judge read the note to both attorneys, the State recommended a *Prim* instruction,[3] and defendant

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[3] *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972). "The *Prim* instruction informs the jury of the requirement that the verdict be unanimous; that the jury has a duty to deliberate; that jurors must impartially consider the evidence; and that

objected, suggesting that the court advise the jury to continue deliberating. The court chose to give the *Prim* instruction, over defendant's objection. Each juror was then questioned and each said that he or she believed that a unanimous decision on all charges would not be reached with additional deliberation. Thereafter, the court stated, because the jury's note indicated it had reached a decision on some counts, but not all, the parties agreed to take verdicts on the counts that the jury had agreed upon. The jury then returned a verdict, finding defendant not guilty of aggravated kidnaping, the trial court entered judgment thereon, and a mistrial was declared as to the remaining counts.

In the beginning of 2000, efforts resumed to retry defendant. On March 20, at a status call, the State stated, upon questioning from the trial court, that it had not been successful in locating A.S. The State indicated that it had checked hospitals and she was not in any, she had not been to school in a week, she was not in jail, the morgue, or at her father's or mother's house. The State also stated that it was continuing to look for A.S.

On March 27, the court again considered the parties' motions *in limine*. The trial court granted the State's motions to preclude defendant from asking about any of A.S.' arrests subsequent to the incident,

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jurors should not hesitate to reexamine their views and change their opinions if they believe them to be erroneous, provided the change is not solely because of the opinion of fellow jurors or for the mere purpose of returning a verdict." *People v. Chapman*, 194 Ill. 2d 186, 222, 743 N.F.2d 48 (2000). "The purpose of the *Prim* instruction is to guide a jury that is unable to reach a unanimous verdict." *Chapman*, 194 Ill. 2d at 222.

from introducing A.S.' statements to Dr. Schmitt, and from mentioning defendant's statement to the police following his arrest. The court also, in connection with the above rulings, denied defendant's motions *in limine* to introduce Schmitt's report in which A.S. stated that she was a prostitute and used cocaine. The trial court's reason for allowing or denying each motion was the same as its reasons in defendant's first trial. With respect to defendant's motion to bar the use of his prior convictions as impeachment evidence, defendant argued that the lack of a decision would be tantamount to placing defendant in an untenable situation. Counsel asked the court for a ruling prior to trial, to which the State did not make an objection. The court, however, stated that its ruling was the same as before; any advance ruling would be premature. According to the count, until defendant chose to testify, it could not make an intelligent decision as to whether defendant's prior convictions would be relevant to his credibility.

On March 28, the State informed he court that, despite its efforts to locate A.S., it was unable to do so and, therefore, was moving to declare her unavailable and use her prior testimony at defendant's second trial. In its motion, the State alleged that on November 5, 1999, A.S. and her mother were informed of the mistrial and the need to testify again. A.S. stated that she was willing to testify again. According to the motion, since that time, the assistant State's Attorney had been in constant contact with A.S. and her mother and that A.S. had given every indication, although "extremely frightened," that she would testify. The State further alleged that on March 10, the assistant State's Attorney learned from A.S.' mother that A.S. had left home the day before and had not returned. The State then began

efforts to locate A.S.[4] Based on the State's belief that it had exhausted all efforts and, asking the court to take note of A.S.' "extreme fear" shown during her prior testimony, the State also asked the court to declare her unavailable. The State further alleged that defendant had a full opportunity to cross-examine A.S. at his first trial; specifically, of the 56 pages of transcript, 25 pages consisted of cross-examination of A.S. The State also asked that the court allow the assistant State's Attorney to read the questions asked of A.S. and to allow its law clerk to read A.S.' answers.

At a hearing on the State's motion, Mary Ember, an investigator for the State's Attorney's office, testified that she attempted to locate A.S. According to Ember, on March 3, she went to A.S.' mother's home and spoke with both A.S.' mother and brother. Neither knew where A.S. was. A.S.' mother stated that A.S. was "very fearful and very concerned" with going back to court. A.S.' mother gave Ember A.S.' father's address as well as other addresses to check. On March 9 or 10, Ember went to A.S.' father's home, but he had no idea where A.S. was and referred Ember to A.S.' mother. Ember stated that she made inquiries of the Medical Examiner's office, public health, the Cook County Hospital, the Cook County jail, the Illinois Department of Corrections, the Department of Public Aid, the Illinois Secretary of State, and the Immigration Department. According to Ember, she made these inquiries repeatedly and had last contacted these entities on March 27. None of these inquiries was

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[4] Although the motion states that the State began its efforts on March 20, the testimony presented at the hearing on the State's motion indicates otherwise.

successful in locating A.S.

Detective Allen Jaglowski testified that he brought A.S. to the courthouse for defendant's first trial and when she was told she would need to testify again. With respect to current efforts to locate A.S., Jaglowski stated that he was contacted by the State's Attorney's office on March 10 and told that A.S. had run away from home. He was asked to help locate her. Jaglowski first went to A.S.' mother's home at 4:30 to 5 a.m., but A.S. was not there. He returned to the residence on numerous dates at different times, approximately every third day. Jaglowski also went to A.S.' father's residence once. According to Jaglowksi, no one at either residence had seen A.S. for some time. Jaglowski last went to A.S.' mother's residence the morning of the hearing. At this time, A.S.' mother advised him that A.S. had called her about two weeks before that time. When A.S. was told that the police were looking for her, she told her mother that she was afraid and would not return to the city. A.S.' mother did not know where A.S. was and had no means of contacting her. Jaglowski stated that he also checked the Medical Examiner's office and the Cook County Department of Corrections. Lastly, Jaglowski stated that he learned of an old friend of A.S.' who lived in Waukegan. Jaglowski went there and spoke with the friend's mother. The mother stated that she had not seen A.S. in several months and that A.S. was not staying with her or her son.

Claudia Morales, a victim-witness advocate for the State's Attorney's office, testified that she met with A.S. and her mother prior to defendant's first trial. According to Morales, A.S. was "very afraid" and "was terrified" to go to court. After defendant's first trial, Morales again met with A.S. and her mother. She

explained to A.S. the need to testify again at which time A.S. was "real white" and crying. However, according to Morales, A.S. stated that she would testify again. Morales further stated that she was contacted by the State's Attorney's office on March 10. Morales called A.S.' mother who indicated that A.S. might be with an ex-boyfriend in Waukegan. A.S.' mother further stated that A.S. had enrolled in cosmetology school, bit had not been there for sometime. A.S.' mother had no other information about A.S. Morales passed the information she obtained on to Jaglowski.

Following arguments by counsel, the court rendered its decision. Although defense counsel argued that this case should be different because it involved a sexual assault and the sole witness was absent, the court disagreed, stating that the same rules apply to all cases. The court concluded that the State had expended "efforts above and beyond [what] one might call due diligent [*sic*], expended efforts that go way beyond due diligence." It was the court's opinion that A.S. had made it impossible for the State to locate her because she did not want to be found. Despite this, according to the court, the State made "superhuman efforts" to locate her, that were made in good faith. Thus, the court concluded that the State would be allowed to use A.S.' prior trial testimony at defendant's second trial. The court stated that it would prefer the reader of the testimony not look like the victim and that the reader should "not use any inflections or emphasis reading the answers." The court then inquired of defendant if he had any suggestions for a reader and defendant responded that the reader should be the court reporter. The court advised the parties to find a reader.

On March 29, 2000, defendant's second trial began.

The State proceeded on two counts of aggravated criminal sexual assault and two counts of criminal sexual assault. Following jury selection, the State presented its witnesses.

Officer McCall testified that on August 6, 1998, at approximately 4:25 a.m., he was on patrol in the area of North Avenue and Pulaski Road, traveling southbound on Pulaski, when a man in a van, whom the officer now knew as Leroy Hearon, flagged him down. After both cars stopped, McCall had a short conversation with Hearon at which time McCall noticed an individual sitting in the backseat of Hearon's car. McCall now knew this individual to be A.S. A.S. was asked to step out of the car, and McCall immediately noticed that her clothing was very dirty, she had plant material stuck to her clothes and hair, she looked as if she had been crying, she had a red puffy face, and she had stains from tears on her face. After McCall had a short conversation with A.S., during which she described the offender who had attacked her, he relayed the description through a flash message over the police radio. The description of the offender was a black male, approximately 6 feet tall, 175 pounds, 30 to 35 years old, with a balding head, a mustache, a pockmarked face, and dark clothing. A.S. further stated that he was also carrying a white plastic bag.

McCall then proceeded to the scene, at A.S.' direction, where the attack had occurred. She directed him to an alley and then to an area behind a garage at 1046 North Monticello. McCall stated that the building appeared to be abandoned and that the backyard was overgrown with plants and littered with debris and garbage. A.S. pointed out the spot where the attack had occurred and McCall noticed depressions in the mud,

side by side, at the site. An evidence technician was called to process the scene. Thereafter, McCall received a radio transmission from Officer August Cervantes and, after this conversation, Cervantes brought an individual matching the description of the offender to the scene. McCall identified defendant, in court, as the individual who was brought to the scene. McCall further testified that defendant was ordered out of the car and, according to McCall, as A.S. got out of the other car, she immediately saw defendant and shrank back into the car, stating, "That's him, that's the man who raped me." McCall advised Cervantes that defendant had been identified and Cervantes transported defendant to Area 4 for processing. McCall then took A.S. to West Suburban Hospital in Oak Park. Following A.S.' examination, she was transported to Area 4 and turned over to detectives for further investigation.

On cross-examination, McCall reiterated that A.S. led him directly to the backyard where the incident allegedly occurred; she did not hesitate at all on how to get there. McCall also stated that none of the officers at the scene discovered a knife. McCall further testified that during his interview with A.S., she stated that she had been left naked in the backyard by defendant.

Leroy Hearon, a Chicago fire department employee, testified that on August 6, at approximately 4 to 4:30 a.m., he was traveling northbound on Pulsaki Avenue near the intersection of Grand Avenue in Chicago. He saw a woman leaning over a car, approximately 30 feet from him. He slowed down, pulled up to her, and noticed that she "was sobbing, visibly shaking, crying." Hearon asked her if she was okay, and she responded that she had just been raped and asked him to take her to the police station. Hearon stated, with respect to her

appearance, that she had "clumps of dirt, grass on the back of her," and that she was "dirty and disheveled." As the two were heading for a police station, Hearon saw a police car, flagged it down, and both cars stopped. The officer came over to Hearon's car and Hearon advised the officer of the situation. The woman then went with the police after Hearon provided them with information as to how to contact him. Hearon identified a photo of the woman and stated that he later learned her name was A.S.

On cross-examination, Hearon stated that A.S. did not flag him down. Hearon admitted that he was not in uniform when he approached A.S., nor in any official car. Hearon also did not tell A.S. that he was a fireman. Hearon indicated that in addition to a Walgreen's, there were at least two other establishments open at the intersection of Grand and Pulaski, which were visible from the spot where he picked up A.S.

Daniel Burke, a Chicago police officer, testified that at approximately 2:10 a.m. on August 6, 1998, he stopped a van on Potomac near Central Park, with two individuals seated in the front seat. As he approached the van, Burke observed a female in the backseat who appeared to be sleeping. Burke learned that the driver was Artemio Cano, the passenger was Mario Hernandez, and the female was A.S. After discovering that the van was stolen, Burke called for backup. Both men were subsequently arrested; Cano for possession of a stolen vehicle and Hernandez for possession of heroin. The charge against Hernandez was later dismissed. After Burke arrested the two men, he awoke A.S. and asked her if she wanted a ride home with a female officer who had arrived at the scene. A.S. refused, stating she would take a bus. Within 10 seconds of her refusal, A.S. walked

away south toward. Division Street.

A.S.' testimony from defendant's first trial was then offered. A law clerk from the State's Attorney's office read the testimony.[5] Prior to reading the testimony, the court advised the jury:

> "[T]he next witness will be presented to you by way of a transcript of the testimony of A[.] S[.] given under oath on November 2nd, 1999 at a previous hearing regarding this case.
>
> You should consider this testimony in the same manner that you would consider the testimony of any other witnesses. You are not to concern yourself with the reason the witness, Miss S[.], is not physically present.[6]
>
> The way this will be done is that an individual will sit upon the witness stand and answer the questions that are asked to [*sic*] her by the State's Attorney and by Mr. Alonso [defendant's attorney]. The same questions and the same answers that she was asked under oath on November 2nd, 1999. So, basically what I'm saying is she'll just be reading you the testimony of A[.] S[.] from 11-2-99."

The court then stated that the "witness will not be sworn because she is not testifying, she is merely reading to you answers given by Miss S[.]."

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[5] Defendant objected to the law clerk as a reader because she was too close in age to A.S.

[6] Defendant objected to these statements.

The law clerk, along with the assistant State's Attorney and defense counsel, then presented A.S.' testimony.[7] A.S. admitted that in the past she had used a name that was not her real name and had used two addresses that were not her real addresses. According to A.S., on August 5, 1998, her boyfriend was Mario Hernandez. On that evening, the two had gone to Hernandez's brother's house on the north side of the city where they met up with Artemio Cano. Cano took over driving the vehicle A.S. and Hernandez were in. At Approximately 2:30 a.m., the three of them were stopped by the police and Cano and Hernandez were arrested. When they left with the police, according to A.S., she was left stranded, so she walked toward Division and Central Park to a bus stop. A.S. waited at the bus stop for approximately 1 hour and 45 minutes, but no bus ever came. She then saw a man, whom she had never seen before, coming toward her. According to A.S., this man put a knife to the right side of her neck and told her to take her pants off. A.S. then identified defendant in court. Thereafter, A.S. testified that defendant put the knife to her neck, and "he–we went–he took me walking," "[i]n back of a–in the backyard. Back of a house." A.S. stated that the two walked through an alley to the backyard, which was dirty. A.S. could not describe the house and did not know the exact location or street. According to A.S., once the two were

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[7] We note that there is no evidence of any hesitation on A.S.' part in answering questions or delay in doing so from a reading of the cold record. However, at a hearing on January 20, 2000, prior to defendant's second trial, the court stated, with respect to A.S.' testimony that, "Every question you asked her, it was like two minutes before you got an answer from her."

in the backyard, defendant took his pants off and told her to "suck his penis." The knife was still on her neck, so A.S. complied. A.S. then stated that she was on her knees and defendant was standing. She did not want to do this, but could not stop because defendant was holding the knife in front of her, pointing it at her. Thereafter, defendant told her to take her pants off. A.S. further stated, "I did it. And then–." At this time, according to A.S., she was lying on her back in the grass. Defendant put his penis in her vagina, which she did not want him to do, but could not stop him. At this point, defense counsel objected, requested a sidebar, and the following colloquy occurred:

> "MR. ALONSO [Defense attorney]: I don't know if she was told or not, she's acting.
>
> THE COURT: Tell her to answer the questions, there's a slight infl[e]ction on some of her answers.
>
> MS. PERONE [Assistant State's Attorney]: We didn't tell her to act at all.
>
> THE COURT: She's just up there as a civilian.
>
> MR. ALONSO: Maybe she wasn't told not to.
>
> MS. PERONE: I'll do what you said."

The testimony then resumed. With respect to defendant's position at the time, A.S. at first could not remember it, then when offered several examples by the State's Attorney, indicated that defendant was on top of her.

A.S. further testified that defendant then put his

penis in her mouth again and ejaculated. A.S. spit it out on her shirt. A.S. also stated that defendant ejaculated in her vagina as well. According to A.S., when defendant touched her with his penis, he stated that if she "didn't make him nut, that he was going to put it in [her] ass." A.S. further stated that, at this time, she was lying on her stomach on the ground and defendant tried to place his penis in her anus, but could not. Defendant then asked A.S. if she "was all right," to which she did not respond because she was scared. Thereafter, defendant left with the knife and she also left, seeking help.

A.S. also stated that after she exited the alley, a man stopped and asked her if she was okay, to which she replied, "No, I just got raped." A.S. did not know this man. The two then went to find the police. According to A.S., when they found a police officer, the officer asked her what happened, she told him, and described the offender as a black man, 6 feet tall, and 145 pounds. Upon further questioning, she corrected the weight to 175 pounds. A.S. further stated that the man had a pockmarked face, a mustache, hardly any hair, was approximately 30 years old, was wearing a black T-shirt and dark blue jeans, and was carrying a white plastic bag.[8] A.S. then went to the scene of the incident with the police and, when defendant was brought there, she identified him, stating "That's him. That's the guy that raped me." A.S. was then taken to the hospital, given an examination, taken to the police station, and finally taken home. A.S. identified defendant in court as the individual she had identified

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[8] During this series of questions, A.S. was predominately asked leading questions, and defense counsel's objections were overruled.

at the scene.

On cross-examination, A.S. stated that she and Hernandez arrived at his brother's house at approximately 11 p.m. and stayed there one-half hour, doing nothing. They then left in a van and drove around. At approximately 1 a.m., they found Cano on the street. According to A.S., the three were together for approximately two to three hours before they were pulled over by the police. However, she then stated that they were pulled over at 2:15 a.m. A.S. denied using drugs with Cano and Hernandez or using drugs at all that evening and denied that she was feeling sick. A.S. further denied that she told the police that she did not want to go with them. She stated that when her two companions were arrested, she had no purse, no money, and no identification. She did not know the part of town they were in because she had never been there before. A.S. further stated that she was scared because she did not want to be left there alone. However, after the police left, she walked to the bus stop because she wanted to go north. She admitted, however, that she was sitting at a bus stop on Division. A.S. also admitted that she saw a Jewel store on the corner, but never walked over to it.

According to A.S., defendant came from the east, he was approximately three to five feet away from her when she first saw him, and she did not see the knife at this time. Defendant then told her to take a walk with him, which was when she noticed the knife. A.S. stated that defendant cut her neck with the knife and, when he did this, he was saying "nasty stuff." However, she could not remember what he had said. According to A.S., the distance from the bus stop to the backyard was two to three blocks and it took them 20 minutes to walk

there. A.S. did not remember when defendant asked her if she was okay; whether it was before she dressed or after. A.S. admitted leaving the backyard less than a minute after defendant and stated that she went directly to Grand, but walked in the opposite direction of the Jewel. She admitted that she saw a Walgreen's on the corner, but did not know if it was open and did not go to it to see.

A.S. also testified that when the man (Hearon) pulled over, she was walking down the street and holding onto cars. According to A.S., it was one-half hour from the time she left the backyard to the time this man stopped. A.S. further stated that when defendant tried to place his penis in her anus, he was pushing hard to do so. A.S. denied telling the police that defendant had left her naked in the backyard.

August Cervantes, a Chicago police department patrolman, testified that at approximately 4:30 a.m. on August 6, 1998, he monitored a flash message from Officer McCall, after which he headed in the direction of the incident, driving up and down main and side streets and alleys looking for an individual who might fit the broadcasted description. At Grand and Pulaski, Cervantes noticed a black male who fit the description walking away from Cervantes' direction of approach and away from 1046 Monticello. According to Cervantes, the man was about six to seven blocks from the scene. As Cervantes pulled closer to the man, he noticed that the individual had on a black shirt, dark blue jeans, and had mud on his jeans and plant material all over his body. The individual was also carrying a white plastic bag. Cervantes then identified defendant, in court, as the individual he had observed that morning. Cervantes further stated that he pulled his car over, exited, and

told defendant to come to the car and put his hands on the hood. After conducting a protective pat down, during which no weapon or knife was found, Cervantes confirmed the description of the offender with McCall. Because defendant matched all of the details of the description, Cervantes placed him under arrest and transported him to the scene. At the scene, Cervantes had defendant exit the car, shined a light on him and, after speaking again with McCall, returned defendant to the car and transported him to Area 4 for processing. On cross-examination, Cervantes stated that defendant cooperated with whatever Cervantes told him to do and did not attempt to run.

Sharon Davis, a registered nurse at West Suburban Hospital, testified that she examined A.S. on August 6, 1998, and prepared a sexual assault evidence collection kit. Davis stated that she noted no obvious signs of distress, no outward acts of hysteria, crying, or uncontrollable behavior on the part of A.S. Davis further stated that A.S. did not appear to be under the influence of anything, so no toxicology test was done. Davis further testified that it was not uncommon for a sexual assault victim to not have vaginal trauma and such an individual may or may not have rectal trauma if penetration was attempted. On cross-examination, Davis stated that she did not do a vaginal examination of A.S. She also indicated that it was her policy not to touch victims unless something in particular was called to her attention. However, she saw no obvious injuries to A.S. and, if she had, she would have charted them. According to the notes, A.S. stated that she had not been beaten up and Davis did not recall if A.S. told her that she had been cut with a knife. However, Davis did not believe she was told this. In addition, Davis stated

that A.S. reported only oral and vaginal penetration, not any anal. However, according to Davis, if A.S. had reported an attempt at anal penetration, she would have charted this. On redirect-examination, Davis stated that A.S. had rather long hair and she would not have pulled A.S.' hair back to inspect her neck during the examination unless A.S. had called her attention to anything in particular.

The parties then stipulated to the chain of custody with respect to A.S.' sexual assault kit, and A.S. and defendant's blood samples for purposes of DNA testing.

Elizabeth Boedeker, an employee of the Illinois State Police at the Forensic Science Center, conducted testing on A.S.' clothing and sexual assault collection kit. Five of seven stains on the front of A.S.' shirt tested positive for semen. With respect to the inside crotch area of A.S.' pants, Boedeker detected six areas of semen there. Boedeker cut out these areas of the clothing, placed them in a Ziploc bag, and in a freezer for further DNA analysis. Boedeker also placed A.S. and defendant's blood samples in the freezer for further DNA analysis. Boedeker further identified semen on the vaginal swab from A.S.' sexual assault kit, but not on the oral swab. The vaginal swab was also placed in the freezer for further testing.

Barbara Wilson, a forensic scientist employed by the Illinois State Police, testified that she performed DNA testing on the semen stains from A.S.' shirt, pants, and vaginal swab. Each stain matched defendant's DNA profile. Wilson also stated that the DNA profile from each stain would be expected to occur one in eight point one trillion blacks, or one in six hundred seventy billion whites. Thus, she concluded that the semen stains

present on A.S.' shirt and pants and the vaginal swab were consistent with having originated from defendant.

The State then rested. When court resumed, defense counsel stated that defendant would not testify. The court admonished defendant with respect to his right not to testify and defendant stated that his decision not to testify was freely and voluntarily made. Defense counsel then moved for a directed verdict, which was denied. Thereafter, the court held a jury instruction conference. Defense counsel argued, with respect to Illinois Pattern Jury Instruction (IPI) No. 11.56, that the third proposition relating to consent should be included in the instruction, contending that the circumstantial evidence led to an inference of consent.[9] The trial court gave the instruction, without

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[9] The same argument was made by defendant at his first trial. The State offered a modified version of IPI No. 11.56, deleting reference to the third proposition with respect to consent. Defense counsel objected, arguing that there was circumstantial evidence of consent presented and, thus, the consent proposition should be included. The court responded that no evidence of consent had been presented. Counsel reiterated that the circumstantial evidence, specifically A.S.' behavior prior to and after the incident, showed consent. The court again stated that it did not see any evidence of consent whatsoever. The trial court concluded that modified IPI No. 11.56 would be given, over defendant's objection. IPI No. 11.58, modified to delete any reference to consent, was also given over defendant's objection. The trial court also refused, over defendant's objection, defendant's tendered IPI No. 11.63 as well as No. 11.63A, which pertain to the defense of consent and the definition of consent, respectively.

the third proposition, over defendant's objection because it had determined that there was no evidence of consent presented. When the jury returned, defense counsel offered a stipulation with respect to the testimony of Dr. Richard Schmitt. Schmitt would have testified that he conducted an examination of A.S. at approximately 5:30 a.m. on August 6, 1998, and that he did not observe any lacerations or trauma to A.S.' vaginal area, which, according to him, was not uncommon. Similarly, according to Schmitt, a visual inspection of A.S.' rectal area revealed no trauma, but A.S. did not advise Schmitt that any attempt at rectal penetration had occurred. Schmitt further would have stated that A.S. had told him a knife was placed to her neck, but he did not notice any trauma to her neck area. Schmitt also would have admitted that no toxicology test was done to detect if there were drugs in A.S.' system.

Defendant then rested and both parties gave closing arguments. Defense counsel argued that the case came down to the credibility of A.S. and that her conduct that evening, both before and after the incident, demonstrated she Was not telling the truth. Defense counsel also argued that the State failed to meet its burden of proving the necessary elements of the crimes with which defendant had been charged. Following instructions, the jury retired to deliberate and thereafter returned guilty verdicts against defendant on the two counts of criminal sexual assault and not guilty verdicts on the two counts of aggravated criminal sexual assault.

On May 10, 2000, defendant filed a motion for a new trial, contending that: the State failed to prove him guilty beyond a reasonable doubt; the jury's verdicts

were against the manifest weight of the evidence; he was denied due process; he did not receive a fair and impartial trial; the trial court erred in ruling that his *Montgomery* motion was premature; the trial court erred in granting the State's motion to declare A.S. unavailable and allowing it to read the transcript of A.S.' testimony from his first trial to the jury; the trial court erred in denying his motion *in limine* precluding him from presenting Dr. Schmitt's statement in connection with A.S.' statements that she was a prostitute and had used cocaine; the trial court erred in giving IPI No. 11.56 without the third proposition relating to consent; and the trial court erred in instructing the jury not to concern itself with the reason why A.S. was unavailable and in denying defendant the right, during closing argument, to argue why she was not present. The trial court subsequently denied the motion.

On the same day, a sentencing hearing was held. In aggravation, the State offered evidence of defendant's 1980 conviction for deviate sexual assault for which he received 7 years' imprisonment, a 1990 conviction for aggravated criminal sexual assault for which defendant received 15 years' imprisonment, and a 1997 conviction for possession of a controlled substance for which he received a term of one year imprisonment. The State further argued that defendant showed no remorse for his conduct, he had no rehabilitative potential because he had not learned from his prior convictions, and he habitually preyed on innocent women. In mitigation, defense counsel argued that defendant had a family, including three children, had graduated from high school, had attended trade school and received a machinist certificate, and while out of jail had been

gainfully employed. Defense counsel further noted that following defendant's first trial, at which A.S. appeared in person, the jury was hung. Defense sought a sentence of 20 to 25 years.

Following counsels' arguments, the court noted that it had reviewed the evidence and it agreed with the jury's conclusion that defendant was guilty. The court also noted that it had reviewed the presentence report and that it would not consider evidence of defendant's alleged 1979 sexual assault or the improper comments defendant had recently made about the trial court to the presentence interviewer. The court further noted that the crime of criminal sexual assault, or rape as the court referred to it, was not about sex but was about "showing what a tough guy Irving Cross thinks he is." According to the court, it had no "qualms" about putting defendant in the penitentiary because defendant "had earned his right to go there." Specifically, according to the trial court, defendant chose himself to go to prison by his own conduct and activities. The court then concluded, based on defendant's two prior convictions, that he must be sentenced as a Class X offender and that consecutive sentences were mandatory pursuant to the Unified Code of Corrections (730 ILCS 5/5-8-4(b) (West 1998)). Thereafter, the court sentenced defendant to 30 years' imprisonment on each count of criminal sexual assault to keep defendant "off of the streets" as long as it could.

On May 31, 2000, defendant filed a motion to reduce sentence, contending that his sentences were excessive and that the trial court improperly considered matters implicit in the offense to increase the sentence. The court denied this motion, concluding that defendant had a propensity for raping, which was a

crime of violence. This appeal followed.

ANALYSIS

I. *Montgomery* Issue

Defendant first contends that the trial court erred as a matter of law in requiring him to testify as a precondition to it rendering a ruling on his *Montgomery* request. Defendant maintains that the trial court failed to hold a timely *Montgomery* hearing, issue a ruling, and, therefore, failed to exercise its discretion at all. Defendant argaes that a delay in ruling until he testified failed to promote the *Montgomery* rationale and to facilitate its objectives. Conversely, according to defendant, the trial court's failure to issue a ruling deprived him of the ability to present the only defense version of the events at issue, that A.S. consented to sex with him, and, thus, denied him the right to present his defense of consent. Specifically, defendant maintains that the trial court's conduct compelled him to make a crucial decision whether to testify "in the dark," *i.e.*, without the benefit of knowing whether his prior convictions would be admissible as impeachment evidence against him. Defendant further maintains that our standard of review is *de novo* because we are reviewing the issue of whether the trial court refused to exercise its discretion in a timely fashion on a pretrial motion to bar evidence.

The State first contends that our standard of review is whether the trial court abused its discretion because we are reviewing a decision with respect to a motion *in limine*. Substantively, the State contends that the trial court may wait until an issue raised by a motion *in limine* arises during trial before rendering a ruling. The State maintains that the trial court did not abuse its

discretion, but rather properly exercised it because it deferred a ruling whether to bar evidence of defendant's prior convictions until it could make a meaningful balancing analysis under *Montgomery, i.e.*, until it was able to assess the impact of defendant's prior convictions based upon defendant's testimony. As such, the State argues that, contrary to defendant's argument, the trial court did not refrain from exercising its discretion altogether.

We agree with the State that the issue here is not whether the trial court properly applied the *Montgomery* test, but, rather, whether the trial court abused its discretion in deferring its ruling until a time when the issue became ripe at trial, *i.e.*, after defendant testified.

The general rule with respect to when a trial court should rule on whether a defendant's prior conviction can be used against him as impeachment evidence is discretionary. *See, e.g., United States v. Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979). In other words, the trial court may render its ruling at any tine it deems appropriate. Nonetheless, the majority of jurisdictions hold that, although not absolutely required, a trial court should rule on the admissibility of prior convictions as impeachment evidence as early as practicable.[10] The

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[10] *United States v. Key*, 717 F.2d 1206, 1208 (8th Cir. 1983) (a defendant is not entitled to an advance ruling on the admissibility of a prior conviction before taking the stand although advance rulings are preferred); *Cook*, 608 F.2d at 1186 (the matter of when to rule is within the discretion of the trial court, but advance rulings are encouraged); *United States v. Oakes*, 565 F.2d 170, 171 (1st Cir. 1977) (there is no inflexible

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rule as to the timing of a ruling; rather the rule is discretionary, but courts are encouraged and should attempt to make a reasonable effort to render advance rulings so that the defendant can make an informed decision whether to testify as long as the court has enough information to make a determination as to the probative value of the prior conviction); *United States v. Jackson*, 405 F. Supp. 938, 942 (E.D. N.Y. 1975) (the trial court should rule as soon possible after the issue is raised so that the defendant and his attorney can make an informed decision whether to testify); *Settles v. State*, 584 So. 2d 1260, 1262 (Miss. 1991) (the grant or denial of a hearing to determine in advance the admissibility of a prior conviction is discretionary, but such decision should be delayed only where absolutely necessary for a fair presentation of the issues); *State v. Busby*, 315 Or. 292, 297, 844 P.2d 897, 899 (1993) (the trial court's ruling on the admissibility of prior convictions should be made before the defendant testifies); State v. *McClure*, 298 Or. 336, 340, 692 P.2d 579, 583 (1984) ("[i]t is not realistic or necessary for a defendant to have to wait until he is on the stand to find out whether he will be impeached with prior crime evidence"; the trial court should rule as soon as possible so that the defendant can make an informed decision; however, this rule is not mandatory; although the trial court may wait until all trial testimony has been received from both sides, this "should be a rare occurrence"). See also *United States v. Del Toro Soto*, 676 F.2d 13, 18 (1st Cir. 1982); *United States v. Halbert*, 668 F.2d 489, 494 (10th Cir. 1982); *United States v. Fountain*, 642 F.2d 1083, 1087 (7th Cir. 1981); *United States v. Cavender*, 578 F.2d 528, 530 n.5 (4th Cir. 1978); *People v. Delgado*, 32 Cal. App. 3d 242, 253-54, 108 Cal. Rptr. 399, 407-08 (1973); *Johnson v. State*, 666 So. 2d 499, 502 (Miss. 1995); *McInnis v. State*, 527 So. 2d 84, 87 (Miss. 1988); *State v. Cole*,

rationale for such a rule is that it enables a defendant the ability to make a better informed decision whether to testify because he has the opportunity of knowing what convictions may be used against him should he choose to testify. *Williams v. State*, 110 Md. App. 1, 27, 675 A.2d 1037, 1050 (1996); *State* v. *Olsan*, 231 Neb. 214, 231, 436 N.W.2d 128, 138 (1989). In addition, an advance ruling may tend to facilitate a more orderly procedure at the trial in that the trial would proceed without interruption for a determination of the issue. *Williams*, 110 Md. App. at 27, 675 A.2d at 1050. However, courts have been reluctant to find an abuse of discretion where a trial court refuses to issue a pretrial, or advance ruling, regarding the admissibility of evidence of a defendant's prior conviction(s) even where the trial court's decision might or did discourage the defendant from testifying.[11]

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142 N.H. 519, 522, 703 A.2d 658, 660 (1997); *State v. Staples*, 120 N.H. 278, 285, 415 A.2d 320, 324 (1980); *State v. Bennett*, 122 R.I. 276, 285, 405 A.2d 1181, 1186 (1979). *Cf. United States v. Hood*, 748 F.2d 439, 441 (8th Cir. 1984); *United States v. Kennedy*, 714 F.2d 968, 975 (9th Cir. 1983); *United States v. Johnston*, 543 F.2d 55, 59 (8th Cir. 1976) (all stating that a defendant is not entitled to an advance ruling).

[11] *United States v. Martinez*, 76 F.3d 1145, 1153 (10th Cir. 1996) (the trial court did not abuse its discretion in refusing to render a ruling either pretrial or prior to the defendant's testimony); *United States v. Masters*, 840 F.2d 587, 590-91 (8th Cir. 1988) (a defendant has no constitutional right to a ruling before he testifies); *Richardson v. State*, 33 Ark. App. 128, 131, 803 S.W.2d 557, 560 (1991) (the trial court did not err in waiting to rule until the defendant testified); *People v.*

Campbell, 23 Cal. App. 4th 1488, 1496 n.12, 28 Cal. Rptr. 2d 716, 721 n.12 (1994) (same as *Washington*); *People v. Washington*, 211 Cal. App. 3d 207, 211, 259 Cal. Rptr. 307, 308-09 (1989) (although reserving a ruling is not customary nor desirable, such a decision is not error); *Williams*, 110 Md. App. at 32, 675 A.2d at 1053 (the trial court should make a pretrial determination as to whether the defendant's request to bar the use of prior convictions as impeachment evidence is capable of being decided prior to trial because a sufficient factual basis exists or whether receipt of additional information or evidence is needed to enable the court to exercise its discretion in ruling; however, a defendant does not have an absolute right to a ruling prior to testifying); *McInnis*, 527 So. 2d at 87 (the trial court did not abuse its discretion in refusing to render a ruling until the conviction was offered at the defendant's trial); *Cole*, 142 N.H. at 522, 703 A.2d at 660 (the trial court did not abuse its discretion in failing to render a pretrial ruling where the defendant's objection was vague, the defendant gave no indication of any possible prejudice to him, and the defendant did not raise any constitutional challenge to the failure to rule); *State v. Newsome*, 798 S.W.2d 542, 543 (Tenn. App. 1990) (same as *Martin* below). See also *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989); *United States v. Witschner*, 624 F.2d 840, 844 (8th Cir. 1980); *Cook*, 608 F.2d at 1186; *Oakes*, 565 F.2d at 171. *But see Apodaca v. People*, 712 P.2d 467, 472-73 (Colo. 1985) (refusing to issue a ruling prior to the defendant's testimony impermissibly burdens the defendant's due process right to testify in his own defense because a ruling "serves the vital function of providing the defendant with the meaningful opportunity to make the type of informed decision contemplated by the fundamental nature of the right to testify in one's own defense"); *People v. Sangster*, 123 Mich. App. 101, 103, 333

Six cases in Illinois have addressed the issue before this court. Defendant relies upon one, *People v. Hill*, 34 Ill. App. 3d 193, 339 N.E.2d 405 (5th Dist. 1975), and the State relies upon the remaining five: *People v. Owen*, 299 Ill. App. 3d 818, 701 N.E.2d 1174 (4th Dist. 1998); *People v. Rose*, 75 Ill. App. 3d 45, 393 N.E.2d 698 (1st Dist. 1st Div. 1979); *People v. Hunter*, 61 Ill. App. 3d 588, 376 N.E.2d 1065 (4th Dist. 1978); *People v. Barksdale*, 24 Ill. App. 3d 489, 321 N.E.2d 489 (1st Dist. 1st Div. 1974); *People v. Ray*, 3 Ill. App. 3d 517, 278 N.E.2d 170 (3d Dist. 1972).

In *Ray*, although the question of when the trial court is required to render a ruling on a defendant's motion to exclude the use of prior convictions as impeachment evidence was not an issue before the

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N.W.2d 180, 181 (1983) (the ruling must be before the defendant takes the stand); *State v. Whitehead*, 104 N.J. 353, 361-62, 517 A.2d 373, 377 (1986) (it is practical for the trial court to render a decision prior to the trial and it is not necessary for the trial court to hear the defendant's testimony in order to render a ruling); *Commonwealth v. Tangle*, 349 Pa. Super. 574, 579, 504 A.2d 193, 195 (Sup. Ct. 1986) (the trial court is required to conduct an *in camera* pretrial hearing and decide the issue; otherwise, the defendant may be denied a meaningful choice with respect to whether to testify or not), *rev'd on other grounds*, 516 Pa. 25, 531 A.2d 1112 (1987); *State v. Gaylor*, 862 S.W.2d 546, 554 (Tenn. App. 1992) (the trial court must rule on the admissibility of a defendant's prior conviction prior to trial, or in any event, before the defendant's testimony); *State v. Porter*, 36 Wash. App. 451, 453, 674 P.2d 694, 695 (1984) (the defendant is entitled to a ruling before he takes the stand).

court, the court nonetheless stated: "[S]uch a question may well be disposed of in a more orderly manner prior to the presentation of evidence than during the course of a trial. [However, the] trial court in its discretion may desire to grant such a motion, deny the same, or withhold its ruling until further evidence is heard." *Ray*, 3 Ill. App. 3d at 523.

In *Barksdale*, the defendant moved three times for a ruling on his motion to exclude the State from using his prior convictions as impeachment evidence, which the trial court refused to entertain, finding the motion premature and stating that it would only rule once the defendant testified. *Barksdale*, 24 Ill. App. 3d at 495. On appeal, the defendant claimed that the trial court had no discretion to wait until he testified before making a ruling on his motion to exclude. *Barksdale*, 24 111. App. 3d at 496. Relying on *Ray*, the Barksdale court held that "a trial court should have the discretion to withhold its ruling on a motion to suppress the admission of prior convictions until the defendant [ ] testifie[s]" because the court may be in a better position to evaluate probativeness and the prejudicial effect of such convictions after hearing the defendant's testimony. *Barksdale*, 24 Ill. App. 3d at 496.

In *Hill*, the defendant argued that the trial court erred in refusing to make an advance ruling on his oral motion to exclude the use of prior convictions to impeach him made before the start of his second trial. *Hill*, 34 Ill. App. 3d at 198. The trial court refused to entertain the defendant's motion, stating that the proper time to make the motion was when, and if, the State attempted to use the convictions against the defendant. *Hill*, 34 Ill. App. 3d at 198. Thereafter, the defendant chose not to testify. *Hill*, 34 Ill. App. 3d at

198. On appeal, the defendant contended that the trial court erred in refusing to rule on his motion to exclude evidence of his prior convictions. The *Hill* court first reviewed the history and rationale of *Montgomery*, but noted that the issue before it was different, although related, from *Montgomery*, because the issue before the court was when the trial court should entertain its discretionary *Montgomery* power. *Hill*, 34 Ill. App. 3d at 199. The *Hill* court then reviewed cases from other jurisdictions, as well as the rationales espoused therein for advance rulings[12] (*Hill*, 34 Ill. App. 3d at 199-203) and stated:

> "[W]e recognize that in some cases it may be necessary for the trial court, on proper motion, to make a ruling on the use of a prior conviction before the beginning of the trial, especially where good reasons are shown that defense counsel's trial strategy will depend upon the ruling." *Hill*, 34 Ill. App. 3d at 206.

However, the *Hill* court further noted that "[a]lthough from the defendant's point of view it might [be] advantageous to have a pretrial ruling on the admissibility of [ ] prior [ ] conviction[s]," nevertheless, "the trial court might well need to see how the trial has progressed up to the point at which the defendant would take the stand," and that in exercising its sound judicial discretion, the trial court may need to "hear the State's trial evidence before ruling on the motion." *Hill*, 34 Ill. App. 3d at 206. The *Hill* court found that the trial court did not abuse its discretion in refusing to rule on the defendant's motion because the defendant's attorney

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[12] The court did not discuss either *Barksdale* or *Ray*.

offered no reason, such as dependence of his trial strategy on a ruling, from which the trial court could have determined that a pretrial ruling was necessary. *Hill*, 34 Ill. App. 3d at 206.

In *Hunter*, although the trial court denied the defendant's motion *in limine* seeking to exclude the use of his prior convictions for impeachment purposes, the *Hunter* court nonetheless stated, relying on *Barksdale*: "It has been ruled that the court may withhold its ruling upon whether evidence of particular convictions of a defendant may be used to impeach him until after the defendant has testified." *Hunter*, 61 Ill. App. 3d at 598. According to the *Hunter* court, this was so because "[b]y waiting to rule, the trial judge is usually in a better position to determine *** whether the probative value of the evidence to negate defendant's credibility exceeds its prejudice to the defendant." *Hunter*, 61 Ill. App. 3d at 598. The *Hunter* court noted, however, that "withholding of a ruling makes defense strategy more difficult." *Hunter*, 61 Ill. App. 3d at 598.

In *Rose*, the defendant, during his trial, filed a motion *in limine* seeking to bar the State from impeaching him with prior convictions. *Rose*, 75 Ill. App. 3d at 50. After the State rested, the defendant moved for a ruling on his motion. Thereafter, the trial court denied the motion. *Rose*, 75 Ill. App. 3d at 51. On appeal, the defendant argued that he was entitled to know before testifying whether the court would allow the State to use his prior convictions. *Rose*, 75 Ill. App. 3d at 52. The *Rose* court, noting that it was unclear whether the trial court had in fact denied the defendant's motion or failed to rule upon it, held that there was no error either way. *Rose*, 75 Ill. App. 3d at 52. Relying on *Barksdale*, the *Rose* court stated that "a

trial court may refrain from making any ruling on a motion to exclude a prior conviction as impeachment evidence until after the defendant has testified." *Rose*, 75 Ill. App. 3d at 52.

In *Owen*, on the morning before the start of the defendant's trial, he filed a motion *in limine* to bar the State from using two prior convictions to impeach him. *Owen*, 299 Ill. App. 3d at 819. The defendant alleged in the motion, *inter alia*, that he needed a ruling on the issue so that he could decide whether to testify or not. *Owen*, 299 Ill. App. 3d at 820. The trial court denied the motion, finding that it was untimely. *Owen*, 299 Ill. App. 3d at 820. Thereafter, the defendant testified and his counsel elicited his prior convictions on direct examination. *Owen*, 299 Ill. App. 3d at 821. On appeal, the defendant contended that the trial court erred in not granting his motion *in limine*. *Owen*, 299 Ill. App. 3d at 821-22. The *Owens* court first noted:

> "In criminal cases like this, a preliminary ruling on the admissibility of a defendant's prior convictions for the purpose of impeaching him would assist the defendant and his counsel in deciding whether defendant wishes to testify, and if so, whether defense counsel should bring out such convictions during direct examination in the hope that his doing so might diminish their negative impact." *Owen*, 299 Ill. App. 3d at 822-23.

The court then discussed the law with respect to a motion *in limine* and the fact that the trial court need not address such a motion at all, or that the trial court may wait and require the presentation of evidence during the normal course of a trial prior to rendering a

ruling on the motion. *Owen*, 299 Ill. App. 3d at 823-24. The court then stated:

> "Given the uncertainties that are inherent with any motion *in limine*, it is difficult to envision a situation in which a trial court would abuse its discretion by choosing not to entertain the motion and instead requiring that the matter be presented and resolved at trial. Although we have trouble envisioning what might constitute an abuse of such discretion, we have no difficulty in determining what does not: denying a motion *in limine* on the ground that it is untimely or on the ground that revolving it might take too much time." *Owen*, 299 Ill. App. 3d at 824.

Thus, the *Owen* court concluded that "the trial court's decision in this case not to entertain defendant's motion *in limine*, based upon its concern about untimeliness, did not constitute an abuse of discretion." *Owen*, 299 Ill. App. 3d at 824. Thereafter, the *Owen* court specifically addressed the issue of prior convictions, noting that although the defendant and counsel would have liked an advance ruling, this desire nonetheless did not mandate that the trial court make such a "preliminary ruling." In this regard, the *Owen* court stated:

> "[Such a ruling would be] preliminary in the sense that the court would be ruling on the admissibility of the defendant's prior convictions before they would normally be at issue. They become at issue, of course, only after (1) a defendant has testified, and (2) the State seeks to introduce his prior convictions for impeachment purposes in its rebuttal case."

Owen, 299 Ill. App. 3d at 824-25.

The court then stated:

> " '[T]he necessity of evaluating all of the factors to be considered in deciding admissibility of a prior conviction in light of the testimony actually introduced at trial permits the court to withhold decision until after the defendant testifies.' [Citation.]" *Owen*, 299 Ill. App. 3d at 825.

The *Owen* court then again concluded that the trial court, in the case before it, did not abuse its discretion in refusing to decide the issue presented by the defendant's motion *in limine*. *Owen*, 299 Ill. App. 3d at 826.

Clearly, the rule in Illinois, as in a majority of jurisdictions, is that it is within the trial court's discretion to determine *when* to entertain a defendant's motion to bar the use of prior convictions for impeachment purposes. Accordingly, defendant's contention here that our review is *de novo* is erroneous. Additionally, defendant's contention that the trial court failed to exercise any discretion because it refused to render a ruling on his motion is also erroneous; case law demonstrates that a trial court in fact exercises its discretion when it refuses to make an advance ruling. Moreover, the trial court here specifically stated that it needed to wait until defendant testified so that it could make a better informed and reasoned analysis under *Montgomery*.

In light of the above, the question in the instant case therefore is whether, under the particular facts contained in the record, the trial court abused its

discretion in refusing to rule on defendant's motion to bar evidence of his prior convictions before defendant took the stand to testify. Defendant's sole basis for concluding that the trial court erred is the fact that the trial court's failure to rule impacted upon his ability to determine whether to testify and, thus, his ability to present a defense. This, however, has repeatedly been deemed an insufficient basis to find an abuse of discretion. Like other cases, we acknowledge that defendant here would have preferred an advance ruling and that he repeatedly asked for one. However, case law does not support a requirement for such an advance ruling. Accordingly, we reject defendant's argument and find that the trial court did not abuse its discretion in refusing to rule on his motion to bar evidence of his prior convictions until after he testified.

II. Admission of A.S.' Prior Testimony

A. Lack of Live Testimony

Defendant next contends that the reading of A.S.' testimony from defendant's first trial violated his sixth amendment right to confrontation because the State failed to meet the requirements for admission of prior recorded testimony since it failed to demonstrate a good faith diligent search to locate A.S., it failed to demonstrate that A.S. was unavailable, and defendant's cross-examination of A.S. at his first trial was inadequate. Defendant argues that he had a right to have A.S. testify personally so that her demeanor could be observed and judged by the jury. With respect to the State's search, defendant argues that it did not act diligently and in good faith because it knew A.S. "was reluctant and difficult" and it failed to use legal process, either through a subpoena or bench warrant, to obtain

her testimony. According to defendant, the State did nothing between his first and second trial to keep in touch with A.S. to ensure her attendance and then, after being unable to locate her for the second trial, it only met with her mother, father, and brother, but failed to interview any other family member or anyone else. Defendant also maintains that the State's search was not diligent because it lasted only a couple of weeks. Defendant further argues that the State acted in the manner it did to obtain an unfair advantage over him because it knew A.S.' demeanor was suspect, her demeanor was central to the case, and it preferred that she not testify live. Thus, according to defendant, the State did not act in good faith. With respect to cross-examination of A.S., defendant maintains that his counsel's cross-examination of her was inadequate at his first trial because he was not allowed to test A.S.' demeanor since he was not allowed to impeach her with her prior arrests and her statements to Dr. Schmitt. Defendant also argues that the trial court erroneously found, at his second trial, that A.S.' demeanor was irrelevant. Defendant further maintains that our standard of review is *de novo* because we are reviewing a sixth amendment violation.

Initially, the State contends that whether the trial court abused its discretion is the standard of review because we are reviewing the trial court's decision on the admissibility of evidence. Substantively, the State contends that the use of a reader in lieu of A.S. did not deny defendant his right to confrontation because the State demonstrated that A.S. was unavailable and that her prior statement bore adequate indicia of reliability. Specifically, the State argues that it demonstrated a good faith effort to locate A.S. in that it assigned an

investigator, a witness advocate, and a Chicago police department detective. The detective made numerous searches for A.S. over the course of several weeks, the State, too, undertook a thorough systematic and reasonable investigation to locate A.S., and there were no remaining leads to follow or upon which to check. With respect to defendant's argument that the State should have subpoenaed A.S., the State maintains that this argument is meritless because, while it knew A.S. was a reluctant witness at defendant's first trial, she nonetheless showed up and testified. Thus, according to the State, it had no reason to doubt that A.S. would not show up at defendant's second trial when she stated that she would. The State also argues that due to the short period of time between the two trials, approximately four months, it had no reason to believe A.S. would not appear. With respect to defendant's argument that the State engaged in the conduct it did to obtain an unfair advantage, the State maintains that this argument is improper because defendant could not know the State's state of mind. Additionally, with respect to defendant's argument that the State did not want A.S. to testify at defendant's second trial because she was a poor witness, the State argues that there is nothing in the record to support this argument. The State further argues that A.S.' credibility is evident from a reading of the transcript and, therefore, defendant was not prevented from arguing her credibility to the jury, which he, in fact, did in closing argument through his counsel, who contended that A.S. lied and that her version of the events was unreasonable. The State further argues that defendant is asking this court to adopt a rule that, when the sole victim of a crime is unavailable to testify, her prior testimony is *per se* inadmissible. According to the State,

such a rule is not supported by any law.

With respect to the reliability of A.S.' prior testimony, the State further contends that the trial court properly concluded that she was subject to sufficient cross-examination at defendant's first trial. Specifically, the State argues that defendant's cross-examination of A.S. at his first trial was detailed, complete, and lengthy. The State also maintains that there was no significant limitation on defendant's ability to cross-examine A.S. and the fact that he was unable to cross-examine her with respect to her prior arrests, cocaine use, or occupation as a prostitute was irrelevant because such limitation was proper.

In his reply brief, defendant maintains that the State failed to follow certain additional leads, including A.S.' beauty school, police records and reports, jail records, and arrest records, which, according to defendant, could have disclosed accomplices, additional dames, aliases, or addresses of people from whom to locate A.S. Defendant also argues that the State failed to interview neighbors, Cano,[13] or Hernandez. Lastly, defendant maintains that the State could have undertaken interviews on the "street corners" where A.S. "carried out her trade."

"A witness' previous testimony may be admitted into evidence at trial, as an exception to the hearsay

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[13] Cano was in jail at the time of defendant's first trial and there was no evidence that he had been released at the time of defendant's second trial. There is also no evidence that. Cano kept in contact with A.S. or that he had any contact whatsoever with A.S., except on the night of the incident.

rule, if the witness has become unavailable and the current opponent of the evidence had the opportunity to cross-examine the witness at the earlier hearing." *People v. McCambry*, 218 Ill. App. 3d 996, 1000, 578 N.E.2d 1224 (1991). This procedure does not violate a defendant's sixth amendment right to confront witnesses against him. *People v. Wilkerson*, 123 Ill. App. 3d 527, 534, 463 N.E.2d 139 (1984). The rationale for excluding former testimony, unless the witness is unavailable, is that "the opportunity to observe the demeanor of the witness gives depth and meaning to the testimony." 29A Am. Jur. 2d Evidence §906, at 327 (1994). "The party seeking admission of a witness' prior testimony must satisfy a three-pronged test: (1) that the witness is dead or unavailable to testify; (2) that a reasonably diligent, good-faith effort to produce the witness has been made; and (3) that there has been an adequate opportunity to cross-examine the witness at the [prior] hearing." *McCambry*, 218 Ill. App. 3d at 1000.

The law is well-settled with respect to the unavailability of a witness and reasonable diligence efforts by the proponent of the absent witness' testimony, *i.e.*:

> "To show that a witness is unavailable, the prosecution must make a good faith effort to obtain his presence at trial. [Citations.] The lengths to which the prosecution must go to produce a witness is a question of reasonableness and does not include futile acts. [Citation.] The ultimate question is whether the witness is unavailable despite the good-faith efforts undertaken prior to trial to locate and present that witness. [Citation.]

> Whether good-faith and reasonable diligence has been exercised is determined on a case-by-case basis after a careful review of the facts and circumstances." *People v. Smith*, 275 Ill. App. 3d 207, 215, 655 N.E.2d 1129 (1995).

The determination as to whether the proponent of a witness' prior testimony has laid a proper foundation and demonstrated that the witness is unavailable is within the discretion of the trial court. 29A Am. Jur. 2d Evidence §906, at 327.

In *Smith,* the court stated, with respect to a defendant's opportunity to adequately cross-examine a witness at a prior hearing, as follows:

> "Where there was an adequate opportunity to cross-examine the witness at the [prior] hearing and defense counsel availed himself of that opportunity, the transcript bears sufficient indicia of reliability and affords the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *Smith*, 275 Ill. App. 3d at 216.

Further, as this court stated in *McCambry*, the question is not whether there was "an opportunity for full and complete cross- examination, but rather, whether there is adequate indicia of reliability." *McCambry*, 218 Ill. App. 3d at 1001.

No case in Illinois has addressed the specific question of whether the testimony of a victim of a criminal sexual assault (or similar crime) given at a former trial or hearing is admissible in a subsequent trial where the victim is found to be unavailable. However, courts in other jurisdictions have addressed

this precise issue and have ruled that such testimony is admissible. See *Gonzalez v. Scully*, 578 F. Supp. 1063, 1074 (S.D. N.Y. 1984) (finding no violation of the defendant's confrontation rights where the testimony of a victim of attempted sodomy at the defendant's preliminary hearing was admitted at the defendant's trial); *People v. Thomas*, 164 Cal. App. 2d 571, 576, 331 P.2d 82, 86 (1958) (rape victim's preliminary hearing testimony was properly read at the defendant's trial); *People v. McIlvain*, 55 Cal. App. 2d 322, 326, 130 P.2d 131, 133 (1942) (rape victim's preliminary hearing testimony was properly offered at the defendant's trial); *People v. Egan*, 91 Cal. App. 44, 48, 266 P. 581, 582-83 (1928) (victim's testimony against the defendant who was charged with assault with intent to rape, given at a preliminary hearing, was properly admitted at the defendant's trial); *Davis v. State*, 255 So. 2d 916, 919-20 (Miss. 1971) (deceased rape victim's testimony from the defendant's first trial was properly read at the defendant's second trial); *Commonwealth v. Griffin*, 243 Pa. Super. 115, 119, 364 A.2d 477, 478-79 (1976) (the testimony of the victim of rape, aggravated battery, and burglary given at the defendant's first trial, which resulted in a hung jury, was properly used at the defendant's second trial). While these cases are not controlling, we nonetheless find them instructive.

We recognize defendant's concern with having live testimony and the need for the jury to observe and judge the demeanor of the witness. Such concerns were pointed out by two Pennsylvania Supreme Court justices in a concurring and dissenting opinion in *Griffin* and, particularly, in connection with deadlocked juries. See *Griffin*, 243 Pa. Super. at 122-27, 364 A.2d at 480-83. Also, in this respect, we disagree with the State

that A.S.' demeanor would be evident from reading the transcript of her prior testimony. In this regard, the State relies extensively on *People v. Kite*, 97 Ill. App. 3d 817, 423 N.E.2d 524 (1981). In *Kite*, the trial court precluded the State from using the prior testimony of the victim of a home invasion, burglary and kidnaping because the witness had been "evasive, nervous and loquacious" in testifying and the trial court found that these demeanors would not show up through reading the transcript, the result of which would violate the defendant's due process rights and right to confront witnesses. *Kite*, 97 Ill. App. 3d at 823. The State appealed and the *Kite* court reversed. Without stating how or why, the *Kite* court found that: "[T]he qualities of being evasive and loquacious, ascribed to the witness by the trial court, would be apparent to the trier of fact from a reading of the transcript." *Kite*, 97 Ill. App. 3d at 824. The court further concluded that whether the witness was nervous or not was immaterial because most witnesses are nervous. *Kite*, 97 Ill. App. 3d at 824. In this same regard, the court found that of the three qualities of demeanor exhibited by the witness, only "his evasiveness would indicate the lack of credibility on the part of the witness." *Kite*, 97 Ill. App. 3d at 824.[14] The court reiterated that "if being evasive and loquacious indicate that a witness' testimony is incredible, such demeanor would be as readily apparent from a reading of the transcript as it would be from observation at trial." *Kite*, 97 Ill. App. 3d at 824. Lastly, the court stated that it knew of "no authority for a trial court to exclude proffered testimony of a witness simply because the court is of the opinion that the witness is

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[14] This finding was made without citation to any authority.

not credible." *Kite*, 97 Ill. App. 3d at 324.

We note that no subsequent case has cited *Kite* for the above outlined propositions. Evasiveness clearly bears upon a witness' demeanor. *Freund Equipment, Inc. v. Fox*, 301 Ill. App. 3d 163, 167, 703 N.E.2d 542 (1998); *General Service Employees Union, Local 73, SEIU, AFL-CIO, CLC v. Illinois Educational Labor Relations Board*, 285 Ill. App. 3d 507, 512, 673 N.E.2d 1084 (1996). Moreover, hesitancy in answering questions goes to a witness' credibility. *People v. Rush*, 250 Ill. App. 3d 530, 535, 620 N.E.2d 1262 (1993). As noted above, in the instant case, it was not evident to this court upon a cold reading of A.S.' transcript that she was evasive or hesitated in answering questions. In fact, this court only became aware of these facts based on the trial court's comments a status conference prior to the beginning of defendant's second trial that A.S. took two minutes to answer each question.

Despite the above concerns, the Illinois legislature has promulgated a provision that excuses the presence of live testimony when a witness is unavailable. It is logical to infer that the legislature, when doing so, was aware of the fact that because the witness would not be present, his or her demeanor could not be judged. However, the legislature made no exceptions in the act for either certain kinds or classes of witnesses, or when the witness' prior testimony is alleged to be uncredible. Similarly, our independent research has not revealed any Illinois case law providing for such exceptions or for excluding an unavailable witness' prior testimony because the credibility of that witness is deemed crucial. Thus, although we acknowledge the concerns with respect to the lack of live testimony, particularly where it involves the sole witness and credibility may be

crucial, based on Illinois law, we decline to hold that A.S.' testimony was inadmissible because she was the sole eyewitness and perhaps incredible or uncredible. Accordingly, we must determine whether the State met its burden of establishing that A.S.' prior recorded testimony was admissible pursuant to the above-enunciated exception to the hearsay rule.

Initially, we agree with the trial court's finding that A.S. was unavailable. It is clear from her telephone conversation with her mother that she was not in the city. It was also evident that she was in hiding and did not want to be located. As the trial court stated, when a witness does not want to be found, she will not be found. The question, then, is whether the State exercised a good faith diligent search to locate A.S.

We again agree with the trial court that the State met its burden of demonstrating that it engaged in a good faith diligent search to locate A.S. The conduct it undertook was detailed in the facts above as well as summarized in the State's argument and need not be repeated. The State undertook an extensive search for A.S., including traveling to Waukegan. It engaged two of its own employees as well as a detective to locate A.S. We deem the State's conduct and course of events reasonable and sufficient.

We briefly note that the case relied upon by defendant, *People v. Payne*, 30 Ill. App. 3d 624, 332 N.E.2d 745 (1975), is distinguishable. In *Payne*, a police officer undertook a search for the witness on his own. Neither the State, nor anyone else, gave him any background information on the witness. Additionally, the State did not provide the officer with any leads. The State further failed to question the officer about his

search and what he had done to locate the witness. In fact, the State did nothing at all to locate the witness. Likewise, the officer failed to contact the witness' mother or any of the neighbors where the witness had previously lived. *Payne*, 30 Ill. App. 3d at 628-29. The *Payne* court noted that the prosecutor had a duty to super vise and coordinate efforts to locate missing witnesses. *Payne*, 30 Ill. App. 3d at 628. The prosecutor completely failed to do so, and the court concluded that the State failed to fulfill its duties and failed to follow specific leads it possessed. *Payne*, 30 Ill. App. 3d at 629. Clearly, this is not the situation before us in the instant case. The State employed its own investigators as well as a detective, who received information from the State's employees. Thus, unlike *Payne*, the State was involved in the investigation, coordinated it, and followed leads that it had obtained.

With respect to defendant's argument that the State's investigation was insufficient because it only lasted for a couple of weeks, we note that in *People v. Burton*, 6 Ill. App. 3d 879, 885, 286 N.E.2d 792 (1972), a 10 to 14-day investigation was found sufficient. With respect to defendant's contention that the State was required to undertake efforts to maintain contact with A.S. during the intermission between the trials, we do not agree. In *Gonzalez*, the defendant made a similar argument and the court there rejected it, relying on *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980). The *Gonzalez* court noted that in *Roberts* the prosecution did not communicate with the witness for 10 months, yet, the Court allowed the admission of his prior testimony. Based upon this, the *Gonzalez* court concluded that there was "no intimation by the Court that the prosecution had any affirmative obligation to

prevent the witness from becoming unavailable." *Gonzalez*, 578 F. Supp. at 1071. Absent any authority to the contrary, we agree with this conclusion. With respect to defendant's argument that the State was required to subpoena A.S. or issue a bench warrant for her arrest, defendant has failed to cite to any authority to support this conclusion, and our independent research has not revealed any. Accordingly, we will not impose this requirement on the State.

Lastly, with respect to defendant's argument that the State failed to follow specific additional leads or to investigate or question additional individuals as identified by defendant in his reply brief, we believe such conduct would have been futile. We comment briefly on only one of defendant's arguments–his contention that the State should have interviewed people on the "street corners" where A.S. "carried out her trade." There is no evidence whatsoever in the record as to what area of the city, let alone what streets, A.S. allegedly "carried out her trade." The record in fact indicates that she had lived both with her mother and father on opposites sides of the city. Moreover, there is no evidence that A.S. even "carried out her trade" on street corners. Accordingly, we deem this argument without any basis.

Based on the foregoing, we conclude that the trial court correctly found that the State laid a proper foundation that A.S. was unavailable and that it had engaged in a good faith diligent effort to find her.

With respect to the adequacy of cross-examination, the only challenge defendant makes in this regard is that he was unable to impeach A.S. with her prior arrests and her statements to Dr. Schmitt. Based on our

conclusion, explained later in this order, that the trial court did not err in precluding defendant from impeaching A.S. with such evidence, we find defendant's argument unpersuasive. We note that defendant's attorney did extensively cross-examine A.S. at defendant's first trial and brought out numerous inconsistencies in her testimony as well as bases from which the jury could have concluded that she was not credible. The jury clearly had the ability to evaluate the truth of her testimony and rendition of the events. Moreover, it is evident that the jury did not find all of A.S.' testimony credible because it did not convict defendant of aggravated criminal sexual assault, *i.e.*, the jury did not believe defendant had a knife. Thus, we find that defendant had an adequate opportunity to cross-examine A.S. and that her testimony bore adequate indicia of reliability.

Based on the above, we find that the trial court properly allowed the State to introduce A.S.' testimony from defendant's first trial at his second trial.

B. Use of Law Clerk as Reader

Alternatively, defendant contends that the State's use of a law clerk, the State's employee, to read A.S.' testimony denied him a fair trial because she was biased and used inflections in reading the transcript of A.S.' testimony. According to defendant, the proper procedure would have been to use a neutral reader, *i.e.*, the court reporter. Defendant maintains that the reader's inflections pertained to the sexual acts at issue, she had to be admonished to stop and, therefore, her conduct was serious. Defendant also argues that the reader was naturally biased in favor of the State because she worked for it. Defendant further maintains

that the reader was too close in age to A.S. and, thus, to the jury, she appeared as an alter ego of A.S. Defendant further argues that, contrary to the trial court's ruling, the reason for A.S.' absence was relevant and he should not have been precluded from arguing the reason for her absence to the jury. Lastly, defendant maintains that our standard of review is *de novo* because we are reviewing the fairness of unorthodox methods of presenting evidence.[15]

Initially, the State contends that our standard of review is whether the trial court abused its discretion because we are reviewing the method of presenting evidence. Substantively, the State contends that the trial court did not abuse its discretion in allowing the State to use its clerk as the reader because she was neutral and fair. According to the State, there is no basis to argue, as defendant does, that she was *per se* biased because she worked for the State's Attorney, nor any basis to argue that the jury viewed her as A.S.' alter ego since the jury never saw A.S. and did not know what she looked like. With respect to the reader's use of inflection, the State argues that defendant complained of only one instance and this single instance was insufficient to establish any prejudice to defendant.

Defendant relies on *People v. Willy*, 301 Ill. 307, 133 N.E. 859 (1921), in support of his contention that a court reporter must read the testimony of an

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[15] Defendant cites *People v. Miller*, 291 Ill. App. 3d 320, 683 N.E.2d 967 (1997), in support of this position. However, there is no mention in *Miller* about *de novo* review and no statement about "unorthodox methods of presenting evidence." Thus, *Miller* does not support defendant's position.

unavailable witness. However, defendant's reliance on *Willy* is misplaced. *Willy* did not involve the reading of prior recorded testimony. Rather, it involved the prosecutor, in closing argument, reading certain testimony given at the defendant's trial from a piece of paper. The prosecutor stated that this paper was his memorandum of the witness' testimony. *Willy*, 301 Ill. at 328. The *Willy* court concluded that such conduct was erroneous, stating:

> "If there is any dispute between attorney[s] as to what a certain witness testified to, the trial court should not attempt to settle the dispute by allowing the reading from the transcript of the evidence made by the shorthand reporter or by any one else, but should allow the jury to pass upon and decide what the witness really testified to." *Willy*, 301 Ill. at 328.

Thus, the question in *Willy* was not *who* could or should read the testimony, but whether one could read the testimony at all. This is not the question before us in the instant case.

Again, there is no case law in Illinois addressing this precise issue. In one case, the prosecutor read the testimony of an eyewitness to a murder and the court concluded that this was proper. *People v. Carr*, 168 Ill. App. 3d 669, 675-76, 523 N.E.2d 393 (1987). However, the question in Carr was not *who* could read the testimony, but whether it was proper to read the testimony at all because the witness was not available (the first issue raised by defendant in the instant case). Courts in other jurisdictions have allowed prosecutors and readers to present the testimony of a sexual assault (or similar crime) victim given in a former proceeding at

a defendant's subsequent trial. See *Gonzalez*, 578 F. Supp. at 1068 (District Attorney allowed to read the testimony of the victim of attempted sodomy in a deviate sexual assault prosecution); *State v. Bell*, 346 So. 2d 1090, 1094 (La. 1977) (District Attorney read the testimony of eyewitness to a riot that resulted in the death of an individual, assistant District Attorney read questions asked at first trial by the prosecutor and the former counsel on cross-examination); *Davis*, 255 So. 2d at 919 (an unidentified individual assumed the role of a deceased rape victim and read her testimony while the district attorney and the defendant's attorney asked the questions). In *Bell*, although not involving a sexual assault victim, the defendant specifically objected to the District Attorney reading the witness' testimony, contending that "due to his position of respect in the community as an elected official, the jury might have been inclined to give greater weight to the testimony than it would otherwise have given." *Bell*, 346 So. 2d at 1094. The *Bell* court concluded that:

> "We agree with defendants that the more desirable procedure would have been to have a neutral party read the prior testimony of the deceased witnesses, but we are not prepared to say that the procedure utilized below amounted to an abuse of discretion or a substantial violation of defendants' constitutional rights." *Bell*, 346 So. 2d at 1094.

In this regard, the *Bell* court noted that prior to reading the testimony of the unavailable witness, the trial court "cautioned the jury that [the District Attorney] was not testifying, but that he was merely reading the testimony of State witnesses who could not be called to testify in person." *Bell*, 346 So. 2d at 1094.

In the instant case, prior to the law clerk reading A.S.' testimony, the trial judge stated that "basically, what I'm saying is she'll just be reading you the testimony of A[.] S[.]" The court then stated that the "witmess will not be sworn because she is not testifying, she is merely reading to you answers given by Miss S[.]" Thus, the admonition given by the trial court in the instant case is similar to that given in *Bell*. Additionally, although the reader was admonished not to use inflections in her voice, as the State points out, this apparently only occurred on one occasion because defendant objected only once and, by defense counsel's own admission, the inflection was slight. We do not believe this isolated incident caused prejudice to defendant to warrant reversal of his convictions.

Lastly, with respect to defendant's argument that he should have been allowed to argue the reason for A.S.' absence, we briefly note that the two cases he relies upon, *People v. Hayes*, 139 Ill. 2d 89, 132, 564 N.E.2d 803 (1990) and *People v. Yonder*, 44 Ill. 2d 376, 392, 256 N.E.2d 321 (1969), do not support his position. These cases did not involve an absent witness or the issue of the admissibility of evidence as to the reason for a witness' absence. Rather, they involved situations where the defendants allegedly attempted to avoid arrest or apprehension, or escaped from custody. The State sought to introduce such evidence under the theory that evidence of an intent to conceal oneself was relevant and admissible to show consciousness of guilt. Because defendant has presented no authority stating that he has a right to argue the reason for A.S.' absence, we decline to address this argument.

Based on the foregoing, while we believe that it would have been more desirable to have the court

reporter read A.S.' testimony, we do not find that the trial court abused its discretion in allowing the State's Attorney's law clerk to do so.

III. Exclusion of Prior Criminal Conduct of A.S.

Defendant next contends that he was denied his right to present a defense because the trial court prohibited him from impeaching A.S. with her statements made to Dr. Schmitt and with her three prior arrests. Specifically, defendant argues that his defense was consent in that A.S. engaged in an act of prostitution with him in exchange for drugs. Defendant maintains that A.S.' statement to the doctor was highly reliable because it was self-confessed, it was made to a treating physician, and it was made contemporaneously with the incident. Defendant also argues that our standard of review is *de novo* because we are reviewing his right to a fair trial and the scope of the rape shield statute.

The State contends that the trial court properly barred defendant from using A.S.' statement to Dr. Schmitt as well as her prior arrests because they were irrelevant and/or barred by the rape shield statute. According to the State, fatal to defendant's contention is the fact that he presented nò evidence of a defense–he only proffered a defense–and that any of A.S.' alleged prior conduct was irrelevant to the issue of whether she consented to sexual intercourse with defendant. The State maintains that our standard of review is whether the trial court abused its discretion because the admissibility of evidence is at issue and the scope of the rape shield statute is not.

A. Prostitution

Defendant argues that the trial court erred in barring the use of A.S.' statement to Dr. Schmitt in connection with prostitution. According to defendant, this statement was constitutionally required to be admitted because it was highly relevant to defendant's defense and, therefore, it was not barred by the rape shield statute. Defendant maintains that the introduction of prior acts of prostitution has not been resolved nor fully accepted by Illinois courts.[16] However, defendant argues that where it is shown that prior acts of prostitution are relevant and necessary to a defendant's defense, they should be admitted.

The State contends that A.S.' alleged prior prostitution was properly barred because it was irrelevant and barred by the rape shield statute. According to the State, such evidence had no bearing on A.S.' relationship with defendant and whether A.S. engaged in prostitution in the past shed no light on whether defendant forced her to have sex with him. The State also argues that even if evidence of A.S.' prior prostitution was admitted, it would not rebut her claim of force. Additionally, the State argues that A.S.' statement does not indicate that she had ever exchanged sex for drugs in the past and, even if she had, this does not demonstrate that she did so in the instant case. The State further maintains that A.S.' statement was barred by the rape shield statute.

The issue in this case is whether defendant was denied his right of confrontation and right to present a

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[16] This argument is clearly rebutted by well-established case law addressed below.

defense as a result of being precluded by the trial court from questioning A.S. about her alleged prostitution.

"A criminal defendant's right to confrontation under the sixth amendment includes the right to cross-examine witnesses against him." *People v. McDonald*, 329 Ill. App. 3d 938, 948, 769 N.E.2d 1008 (2002). "'Any permissible matter which affects the witness's credibility may be developed on cross-examination.' [Citation.]" *McDonald*, 329 Ill. App. 3d at 948-49. "However, '[a] defendant's rights under the confrontation clause are not absolute. Rather, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Emphasis in original). [Citations.]'" *McDonald*, 329 Ill. App. 3d at 949. As stated by the court in *McDonald*:

> " 'It is well established *** that a trial judge has wide latitude to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, or interrogation that is repetitive or of little relevance.' [Citation.] The proposed line of questioning must relate to a 'proper,' or material, subject matter, and the evidence that the defendant seeks to elicit must not be 'remote or uncertain,' *i.e.*, the evidence must be probative of whether 'the witness has something to gain or lose by his testimony.' [Citation.]" *McDonald*, 329 Ill. App. 3d at 949.

We will not disturb the trial court's decision unless there has been a clear abuse of discretion that resulted in manifest prejudice to the defendant. *McDonald*, 329

Ill. App. 3d at 949.

The exclusion of evidence under the rape shield statute falls within the ambit of the confrontation clause. See, *e.g.*, *People v. Sandoval*, 135 Ill. 2d 159, 552 N.E.2d 726 (1990) (addressing rape shield statute and exclusion of evidence thereunder in the context of cross-examination). The rape shield statute provides:

> "In prosecutions for predatory criminal sexual assault of a child * * * the prior sexual activity or the reputation of the alleged victim is inadmissible except (1) as evidence concerning the past sexual conduct of the alleged victim with the accused when this evidence is being offered by the accused upon the issue of whether the alleged victim consented to the sexual conduct with respect to the offense alleged; or (2) when *constitutionally required* to be admitted." (Emphasis added.) 725 ILCS 5/115-7 (West 1998).

No case since the addition of the "constitutionally required" phrase to the rape shield statute has addressed the admissibility of evidence of prostitution. However, prior to this addition, it was repeatedly held that the sexual history of a victim had no bearing on the conduct that formed the basis for the assault at issue in any particular case. See *People v. Hill*, 289 Ill. App. 3d 859, 863, 683 N.E.2d 188 (1997); *Sandoval*, 135 Ill. 2d at 177. Exclusion of such prior sexual activity included not only prior acts or allegations of prostitution on the part of the victim, but even prior convictions for prostitution.

In *People v. Ivory*, 139 Ill. App. 3d 448, 487 N.E.2d 1035 (1985), the defendant argued that his right to

confrontation was denied when the trial court improperly limited his cross-examination of the victim, *i.e.*, he was not able to question her about her prior misdemeanor conviction for prostitution or her alleged profession as a prostitute. *Ivory*, 139 Ill. App. 3d at 453. The court concluded that such evidence was inadmissible because it did not involve conduct between the defendant and the victim and Illinois courts had previously held that the rape shield statute "mandates the exclusion of evidence of the victim's alleged profession as a prostitute." *Ivory*, 139 Ill. App. 3d at 453 (citing *People v. Newman*, 123 Ill. App. 3d 43, 462 N.E.2d 731 (1984); *People v. Hughes*, 121 Ill. App. 3d 992, 460 N.E.2d 485 (1984); *People v. Buford*, 110 Ill. App. 3d 46, 441 N.E.2d 1235 (1982)). See also *People v. Sawyer*, 48 Ill. 2d 127, 129, 268 N.E.2d 689 (1971) (the supreme court held that a previous prostitution conviction was an improper basis for impeachment of the victim); *People v. Muhammad*, 132 Ill. App. 3d 901, 907, 478 N.E.2d 457 (1985) (same).

In *Sandoval*, the supreme court gave numerous bases for the exclusion of prior sexual activity of the victim. The defendant in *Sandoval* sought to introduce evidence that he had previously had anal sex with the victim. The court concluded that such evidence was inadmissible under the rape shield statute, stating that it had no bearing on whether the defendant sexually assaulted the victim in the case before it. *Sandoval*, 135 Ill. 2d at 176. Rather, such evidence "would only serve to accentuate the particular type of sexual conduct rather than the use of force to accomplish contact." *Sandoval*, 135 Ill. 2d at 176. The court also noted that, as in *People v. Ellison*, 123 Ill. App. 3d 615, 463 N.E.2d 175 (1984), the evidence the defendant sought to

introduce "would have added no information which could have helped the jury decide whether or not the complainant had been forced to have sex with the defendant *on this occasion.*" (Emphasis in original.) *Sandoval*, 135 Ill. 2d at 181. The court then noted that impeachment was restricted to relevant matters only (*Sandoval*, 135 Ill. 2d at 181) and that the prior sexual history of the victim was irrelevant (*Sandoval*, 135 Ill. 2d at 182). The court also stated: "Whether the complainant had participated in this particular sexual practice 2 times or 20 times has no bearing, however, on whether a particular instance of sex was consented to." *Sandoval*, 135 Ill. 2d at 183. The court further stated: "An act performed with gentleness on one occasion may be quite different than that same act performed with anger, hostility, or vehemence. Thus, even had complainant initiated anal intercourse with others in the past, we fail to see its relevance to the charges levied against [the defendant]." *Sandoval*, 135 Ill. 2d at 183. The *Sandoval* court then looked to other jurisdictions and particularly noted the comment of the Michigan Supreme Court that:

> " 'Like prostitution, the fact that a person is a homosexual, standing alone, has little or no logical relevance between the excluded prior sexual acts evidence and the issues of consent or credibility. Thus, to the extent defendant sought to introduce evidence as to complainant's reputation as a homosexual or to specific acts of homosexuality for the purpose of bolstering his defense of consent, we find such evidence is irrelevant.' [Citation.]" *Sandoval*, 135 Ill. 2d at 184.

Ultimately, the *Sandoval* court concluded that

"[w]hatever particular sexual practices [the victim] engaged in with other men, such testimony would not impact testimony about her actions with the defendant." *Sandoval*, 135 Ill. 2d at 188.

Despite this well-established law, defendant here nonetheless contends that evidence of A.S.' alleged prostitution was admissible because it is "constitutionally required to be admitted." Defendant relies on *People v. McClure*, 42 Ill. App. 3d 952, 356 N.E.2d 899 (1976), in support of his argument. *McClure* was decided prior to the adoption of the rape shield statute and, at the time of the *McClure* decision, a victim's general reputation for immorality or unchastity was commonly admitted. *Sandoval*, 135 Ill. 2d at 168. However, the law is clearly different now; the rape shield statute is a dramatic departure from prior law in Illinois. *Sandoval*, 135 Ill. 2d at 168.

The court in *People v. Darby*, 302 111. App. 3d 866, 706 N.E.2d 1050 (1999), one of a limited number of cases on point, minimally addressed the issue of when evidence is admissible under the "constitutionally required" exception to the rape shield statute. According to *Darby*:

> "To be 'constitutionally required,' other sexual activity evidence has to be more than simply relevant, it must be germane to the accused's right to confront witnesses against him or to present his theory of the case." *Darby*, 302 Ill. App. 3d at 874.

This determination is made on a case-by-case basis. *Darby*, 302 Ill. App. 3d at 874.

Sandoval itself gave examples of when evidence of

prior sexual activity of the victim would be constitutionally required because it would be probative and relevant to the defendant's confrontation right. First, such evidence would be admissible if it showed bias, interest, or an ulterior motive for making a false charge. *Sandoval*, 135 Ill. 2d at 174-75. Second, it would be admissible if it could explain physical facts in evidence or a physical condition indicative of sexual activity. *Sandoval*, 135 Ill. 2d at 185. As a last example, *Sandoval* stated that such evidence would be admissible where it demonstrated that the victim engaged in a prior pattern of behavior clearly similar to the conduct at issue.[17] *Sandoval*, 135 Ill. 2d at 185. In connection with this "pattern of behavior" exception, the *Sandoval* court stated that to fit within a pattern, the victim's "particular practice [must be] so unusual, so outside the norm, that it had distinctive characteristics which ma[d]e it the complainant's *modus operandi*." *Sandoval*, 135 Ill. 2d at 186. Similarly, the court stated that to fit within a pattern, the conduct must "show[] the individual's unique 'signature.'" Sandoval, 135 Ill. 2d at 186.

In *People v. Weatherspoon*, 265 Ill. App. 3d 386, 637 N.E.2d 651 (1994), the trial court precluded the defendant from introducing evidence that the victim had previously engaged in a pattern of sexual behavior with him to obtain drugs to show her consent to have

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[17] It would appear this is the basis on which defendant sought to admit A.S.' alleged prostitution since it is his argument that if she was a hooker the week before, it was more likely that she was a hooker at the time of their encounter and, thus, A.S. consented to the encounter.

sexual relations with him. On appeal, the defendant argued that the court's preclusion of this prior pattern denied him his right to confrontation. *Weatherspoon*, 265 Ill. App. 3d at 392. The *Weatherspoon* court found that evidence of prior sexual activity was properly excluded because "such evidence has no bearing on whether [the victim] consented to sexual relations with the defendant." *Weatherspoon*, 265 Ill. App. 3d at 392.

Initially, we disagree with defendant that our standard of review is *de novo*. Defendant's right of confrontation is at issue and case law is well-settled that the standard of review in such cases is whether the trial court abused its discretion. See *McDonald*, 329 Ill. App. 3d at 949. However, we do agree with defendant that A.S.' statement to Dr. Schmitt was highly reliable. Despite such a finding, this alone does not render the statement admissible. Based on the above law, under either a confrontation clause analysis or the rape shield statute, evidence of prior sexual activity must be relevant and, more particularly, under the rape shield statute, it must be *germane*. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' [Citation.]" *People v. Green*, 322 Ill. App. 3d 747, 757, 751 N.E.2d 10 (2001). "Germane" means "closely akin," or "having a close relationship." Webster's Third New International Dictionary 951 (1993).

Again, in the instant case, defendant appears to be arguing that A.S.' prostitution is relevant to show consent because if she engaged in prostitution in the past, it is more likely that she did so with defendant. We do not agree. First, as the State argues, A.S.' statement

does not show nor prove that she exchanged sex for drugs in the past. Rather, it only demonstrates that she was a prostitute. There is nothing in the statement from which even an inference could be drawn that she had previously exchanged sex for drugs. There is no evidence of any *modus operandi* or unique and distinctive conduct, let alone evidence of A.S.' signature. Thus, there is no evidence of a pattern of behavior to warrant admission of her alleged prostitution under the rape shield statute. Moreover, the "fact of consequence" in this case is, did defendant force A.S. to have sexual relations with him. A.S.' statement was of dubious relevance, if any, to this fact. Even if A.S. exchanged sex for drugs in the past, this had no relevance to her encounter with defendant and whether she offered to exchange sex with defendant for drugs. As the court in *Sandoval* stated: "Whether the complainant had participated in this particular sexual practice 2 times or 20 times has no bearing *** on whether a particular instance of sex was consented to." *Sandoval*, 135 Ill. 2d at 183. More importantly, even assuming A.S. did offer defendant sex for drugs, this would not establish that the encounter did not turn contentious, that she told defendant "no" during the encounter, and that defendant then forced her into sexual relations. A.S.' statement simply has no bearing on whether she consented to defendant's conduct, *i.e.*, on defendant's claimed consent defense. Exclusion of such evidence, therefore, did not deny defendant the right to confront witnesses or to present a defense. Defendant had the opportunity to present his consent defense through his own testimony, yet failed to do so. Accordingly, we find that the trial court did not abuse its discretion in precluding defendant from presenting A.S.' statement to Dr. Schmitt in connection with prostitution.

B. Drug Use

Defendant next argues, with respect to the portion of A.S.' statement concerning drug use, that drugs are not covered by the rape shield statute and, therefore, the act does not bar admission of this portion of the statement.[18] According to defendant, like prostitution, drug use is a disreputable and illegal act that goes to A.S.' credibility and is relevant to impeach her. Defendant argues that A.S.' statement with respect to drug use could have undermined her credibility and persuaded the jury that she was dishonest in that she did not fairly describe her encounter with defendant.

The State contends that the trial court did not abuse its discretion in barring the statement with respect to A.S.' drug use because such evidence was irrelevant to any issue in the case. Specifically, the State argues that whether A.S. used drugs had no bearing on whether defendant forced her to have sex. The State concedes that such evidence would be relevant to A.S.' credibility if the drug use was near the time of the incident, but there was no such evidence here, as defendant admits. The State further argues that such evidence is irrelevant because even if A.S. used drugs in the past, it does not demonstrate that she prostituted herself on this occasion for drugs.

As previously stated above, the trial court has wide latitude in determining the scope of cross-examination. *People v. Kegley*, 227 Ill. App. 3d 48, 54, 590 N.E.2d 922 (1992). Impeachment on collateral matters, however, is not permissible. *Kegley*, 227 Ill. App. 3d at 54. It is within the discretion of the trial court to determine

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[18] We agree, but this does not resolve the issue.

whether a matter is collateral or not. *Kegley*, 227 Ill. App. 3d at 54. "The right to cross-examine a witness about an unlawful or disreputable occupation or activity as a matter affecting the witness' credibility is unchallenged." *Kegley*, 227 Ill. App. 3d at 54. Drug addiction is one such activity. *Kegley*, 227 Ill. App. 3d at 54. As such, "[i]t is well settled that evidence of drug addiction is admissible not only to impeach a witness' ability to recall or testify, but tc impeach such witness' honesty and integrity in general." *People v. Tomes*, 284 Ill. App. 3d 514, 522, 672 N.E.2d 289 (1996). See also *People v. Daniels*, 287 Ill. App. 3d 477, 484, 677 N.E.2d 1385 (1997). However, there is a difference between drug addiction and drug use. *People v. Parchman*, 302 Ill. App. 3d 627, 638, 707 N.E.2d 88 (1998). It is within a trial court's discretion to limit questioning about drug use where there is insufficient evidence of addiction. *Tomes*, 284 Ill. App. 3d at 522 (noting that those cases finding that evidence was improperly excluded involved drug addiction, not mere drug use).

Based on the above principles, we find that the trial court did not abuse its discretion in precluding defendant from presenting evidence of A.S.' statement to Dr. Schmitt in connection with drug use. In *Kegley*, the court concluded that there was no error in precluding the defendant from questioning a witness about his drug use where there was evidence of only a single instance of use and, thus, such evidence did not rise to the level of drug addiction. *Kegley*, 227 Ill. App. 3d at 55. See also *Tomes*, 284 Ill. App. 3d at 522 (where insufficient evidence of a witness' addiction to marijuana was presented, the trial court did not err in concluding that the questions the defendant sought to ask were "completely irrelevant"); *People v. DeSavieu*,

120 Ill. App. 3d 420, 430, 458 N.E.2d 504 (1983) (a witness could not be impeached on alleged drug use where there was no evidence of addiction shown). As in *Kegley*, *Tomes*, and *DeSavieu*, the evidence in the instant case was insufficient to establish that A.S. had a drug addiction. Her statement to Schmitt merely indicates that she had "used" rock cocaine. The statement does not indicate the number of times, the frequency, the duration of use, or her most recent use. Accordingly, we find that the trial court did not abuse its discretion in precluding defendant from making such an inquiry.

C. Prior Arrests

Defendant next argues that the trial court denied him his right to confront A.S. to show her bias when it barred him from presenting evidence of her prior arrests. According to defendant, the fact that the State SOL'd two of the charges against A.S. was relevant because it aroused expectations or fears in A.S. that the charges could be reinstated. Defendant further argues that A.S.' prior arrests were relevant to undermine her credibility and to impeach her story; specifically, her fear that the charges might be reinstated could have motivated her to claim that she was a victim.

The State first contends that defendant waived review of this issue because he did not raise it in his posttrial motion. Substantively, the State argues that A.S.' arrests were irrelevant to A.S.' motive because it is not known whether the charges could have been reinstated or not. According to the State, the information contained in the record is too remote and uncertain since very little is known about the arrests and subsequent events concerning them.

"The sixth amendment right of confrontation includes the right to cross-examine a witness regarding the witness' biases, interests, or motives to testify." *People. v. Bull*, 185 Ill. 2d 179, 206, 705 N.E.2d 824 (1998). Specifically, as stated in *Bull*:

> "A witness may be impeached by attacking her character. Only criminal convictions may be used; proof of arrests or other charges are inadmissible. However, another accepted method of impeachment is to show a witness' bias, interest, or motive to testify. With this method of impeachment, the defendant may show or inquire into the fact that a witness has been arrested or otherwise charged with a crime where it would reasonably tend to show that the witness' testimony might be influenced by interest, bias, or a motive to testify falsely." *Bull*, 185 Ill. 2d at 206.

Thus, "[i]t is well established that cross-examination to show that a witness might be vulnerable to pressure, whether real or imagined, from the State regarding a pending charge is a matter of right." *Tomes*, 284 Ill. App. 3d at 520. "However, where there is no expectation of leniency from the State regarding the pending charge, the trial court may prohibit cross-examination regarding the charge." *Tomes*, 284 Ill. App. 3d at 520. It does not matter that such charges were SOL'd. *Tomes*, 284 Ill. App. 3d at 520. See also *People v. Morando*, 169 Ill. App. 3d 716, 721, 523 N.E.2d 1061 (1988) ("impeachment may include charges that have been stricken but that still may be reinstated"). The evidence to be used, however, "must give rise to the inference that the witness has something to gain or lose by his or her testimony. Therefore, the evidence used must not be

remote or uncertain." *Bull*, 185 Ill. 2d at 206. We will reverse the trial court's decision only where there is an abuse of discretion resulting in manifest prejudice to the defendant. *Morando*, 169 Ill. App. 3d at 721.

In *Tomes*, the court concluded that although the trial court should have allowed the defendant's attorney to question a witness about three recent theft charges that were SOL'd and it was error not to do so, it nonetheless concluded that such error "may be harmless" because the defendant failed to show a nexus between the SOL'd charges and the witness' trial testimony. *Tomes*, 284 Ill. App. 3d at 520.

Here, the evidence defendant sought to offer is too speculative. Defendant sought to show that because of A.S.' prior arrests, two of which were SOL'd, she may have anticipated that if she did not testify, the charges would be reinstated. Although the charges were not remote, as in *Tomes*, defendant failed to show a nexus between the charges and A.S.' trial testimony. The evidence present in the record clearly demonstrates that the State did not even know about the charges until defendant raised them. Moreover, the State specifically advised the court that no promises had been made to A.S. Because the evidence was uncertain as to A.S.' prior arrests and there was no evidence of any leniency offered, we find that the trial court properly limited defendant's cross-examination of A.S. on these arrests and, therefore, did not deny defendant his sixth amendment right.

IV. Failure to Give Consent Instruction

Defendant next contends that the trial court erred in failing to instruct the jury on his consent defense since the evidence presented suggested that the

encounter between he and A.S. was consensual. According to defendant, slight evidence was introduced to warrant a consent instruction because he asserted in his answer a defense of consent and consent was reflected by the circumstantial evidence. Specifically, defendant argues that there was no evidence of trauma or injury to A.S.; defendant's question to A.S. as to whether she was okay showed a caring reaction to her; A.S. did not stop at any number of open locations to seek help; A.S. readily got into a car with an unknown man; and A.S. engaged in bizarre behavior that evening. According to defendant, the trial court had no valid reason for refusing a consent instruction. Defendant again maintains that our standard of review is *de novo*.

The State contends that the trial court properly refused a consent instruction because defendant presented no evidence showing that A.S. freely agreed to defendant's sex acts. The State also argues that the fact defendant asserted the consent defense in his answer is irrelevant because this was not presented to the jury. Lastly, with respect to defendant's argument that A.S.' behavior was evidence of consent, the State maintains that the only conduct defendant relies on was conduct prior to and after the incident, not during, and this behavior was unknown to defendant until the time of his first trial. The State further argues that even if A.S. did behave bizarrely, this did not give defendant the right to sexually assault her.

"A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence. If there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury." *People v. Santos*, 333 Ill. App. 3d 1, 7, 774 N.E.2d 473 (2002). In this regard, "[v]ery

slight evidence upon a given theory of a case will justify the giving of an instruction." *Santos*, 333 Ill. App. 3d at 7. To avail himself of the defense of consent, a defendant must produce some evidence *at trial* to demonstrate that the victim consented. *Santos*, 333 Ill. App. 3d at 7. This evidence may be offered by the defendant or the State. *Santos*, 333 Ill. App. 3d at 7.

Initially, defendant relies on *People v. Coleman*, 166 Ill. App. 3d 242, 520 N.E.2d 55 (1987), in support of his argument that a consent instruction was required and maintains that the trial court's reliance on *People v. Roberts*, 182 Ill. App. 3d 313, 537 N.E.2d 1080 (1989), was erroneous. We need not detail the facts of these two cases because neither is on point. In both cases, the trial court in fact instructed the jury in some manner regarding consent. Thus, the issue in *Coleman* and *Roberts* was not whether there was sufficient evidence to warrant a consent instruction, which is the issue in the instant case. In *Coleman* and *Roberts*, the defendants clearly presented slight evidence to warrant a consent instruction because such an instruction was given. Additionally, in both cases, the defendants testified in their own behalf and presented a version of the events that led, at least, to an inference of consent on the part of the victims.

We agree with the trial court here that there was no evidence, not even slight evidence, presented to warrant a consent instruction. First, defendant's assertion of the defense in his answer, contrary to his contention, is not *evidence* presented *at trial*. Second, and most importantly, the circumstantial evidence defendant relies on does not show that A.S. consented to defendant's conduct. It may show other things, *e.g.*, that A.S. did not make the best choices at times, but it does

not show that she consented to defendant forcing her at knife point into an abandoned backyard and forcing her to engage in various sexual acts. Moreover, A.S.' testimony, which was uncontradicted, shows that she did not consent to defendant's conduct. Like the situation in *People v. Barnwell*, 285 Ill. App. 3d 981, 992, 675 N.E.2d 148 (1996), in the instant case, defendant did not testify at all and, thus, there was no testimony on the issue of consent, nor was there any evidence presented to indicate that the sexual acts performed upon A.S. were consensual. Accordingly, we find that defendant was not entitled to a consent instruction and the trial court did not err in refusing it.

V. Double Jeopardy

Defendant next contends that retrying him violated the double jeopardy rule because the State accepted a verdict on less than all counts at his first trial, which bars retrial. Defendant maintains that at his first trial he was tried on charges of aggravated kidnaping, kidnaping, two counts of criminal sexual assault, and two counts of aggravated criminal sexual assault. Following deliberations, the jury indicated that it could not reach a verdict on all counts and signed only a not guilty verdict on the aggravated kidnaping charge. According to defendant, the first jury's silence on the other counts equated to an acquittal. Defendant further maintains that the State's acceptance of a partial verdict bars retrial. Defendant also again maintains that our standard of review is *de novo*.

Initially, the State contends that defendant waived this issue because he raises it for the first time on appeal. Substantively, the State contends that retrial of defendant did not violate double jeopardy because his

original jeopardy never terminated. According to the State, jeopardy is not terminated by a jury's failure to reach a verdict, nor is it terminated by the declaration of a mistrial. The State argies that in the instant case, unlike the cases relied upon by defendant, the jury was not silent, it was hung and it was clear that the State intended to retry defendant following the first trial.

Defendant is correct as to our standard of review. Double jeopardy is a question of law that is reviewed *de novo*. *People v. Daniels*, 187 Ill. 2d 301, 307, 718 N.E.2d 149 (1999). Pursuant to the double jeopardy clauses of both the United States and Illinois Constitutions, "the State may not retry a person for a crime of which he has previously been acquitted or convicted." *Daniels*, 187 Ill. 2d at 309. Jeopardy attaches in a jury trial when the jury is empaneled and sworn in. *Daniels*, 187 Ill. 2d at 310. The State may, however, retry a defendant where a deadlocked jury prompts the trial court to declare a mistrial. *Daniels*, 187 Ill. 2d at 310. Specifically, "[w]hen a mistrial is properly declared solely on the basis of the inability of the jury to reach a verdict, retrial does not result in double jeopardy, regardless of the sufficiency of the evidence at the first trial." *People v. Doyle*, 328 Ill. App. 3d 1, 6, 765 N.E.2d 85 (2002). This rule is long-standing and well-established. See, *e.g.*, *People v. Hobbs*, 301 Ill. App. 3d 581, 584, 703 N.E.2d 943 (1998). This is so because jeopardy continues "if a conviction is reversed on appeal or if the trial ends in a mistrial, *i.e.*, any situation in which the jeopardy that attached in the first trial remains open so that defendant can be reprosecuted for the same crime." *Daniels*, 187 Ill. 2d at 310-11. " '[T]he failure of the jury to reach a verdict is not an event which terminates jeopardy.' [Citation.]" *Hobbs*, 301 Ill. App. 3d at 584.

Conversely, "[j]eopardy 'terminates' if the trial concludes under conditions in which defendant could not be retried without violating the double jeopardy rule, *i.e.*, if defendant is acquitted of a crime." *Daniels*, 187 Ill. 2d at 311. In this regard, "[a]n acquittal is 'a verdict or finding of not guilty of an offense, rendered by a legally constituted jury.' [Citation.]" *Daniels*, 187 Ill. 2d at 311. " 'An acquittal generally requires some resolution of a defendant's factual guilt or innocence' [citation], or the State's acquiescence to orders dismissing charges against the defendant with prejudice." *Daniels*, 187 Ill. 2d at 311.

Initially, we note that the cases relied upon by defendant do not aid him. In *People v. Thurman*, 120 Ill. App. 3d 975, 458 N.E.2d 1038 (1983), the defendant was charged with murder, armed violence predicated upon murder, voluntary manslaughter, armed violence predicated upon voluntary manslaughter, involuntary manslaughter, and armed violence predicated upon involuntary manslaughter. *Thurman*, 120 Ill. App. 3d at 977. The jury returned a not guilty verdict on the murder charge. *Thurman*, 120 Ill. App. 3d at 977. The trial court then instructed the jury to continue deliberations because there were five more charges before it. *Thurman*, 120 Ill. App. 3d at 977. Thereafter, the jury returned not guilty verdicts on voluntary manslaughter and armed violence predicated upon voluntary manslaughter and guilty verdicts on involuntary manslaughter and armed violence predicated upon involuntary manslaughter. *Thurman*, 120 Ill. App. 3d at 978. The jury did not return any verdict with respect to armed violence predicated upon murder. *Thurman*, 120 Ill. App. 3d at 978. On appeal, the defendant argued that he could not be found guilty

of any of the remaining charges once the jury found him not guilty of murder. The *Thurman* court disagreed, stating that the not guilty verdict on murder did not equate to an acquittal as to the remaining charges. *Thurman*, 120 Ill. App. 3d at 979. The court further stated, however, that the defendant could not later be retried on the armed violence charge predicated upon murder. *Thurman*, 120 Ill. App. 3d at 979. Although the *Thurman* court stated no reason for its ruling, it is logical to conclude that the court ruled in this manner because the jury found the defendant not guilty of murder and, if the defendant was not guilty of murder, he could not be guilty of armed violence predicated upon murder. This is not the situation before this court. We do not have two charges dependent upon each other. Thus, *Thurman* is not applicable.

In *People v. Rollins*, 108 Ill. App. 3d 480, 438 N.E.2d 1322 (1982), the court merely set forth the rule that when a jury convicts a defendant on some counts but is silent on other counts and the jury is thereafter discharged *without* the defendant's consent, the effect of the discharge is an acquittal. *Rollins*, 108 Ill. App. 3d at 485. *Rollins* is distinguishable from the instant case for two reasons. First, the jury was not silent here; the jury specifically stated that it could not reach a verdict on all counts. Second, the jury here was not discharged without defendant's consent. The record discloses that both parties agreed to take the verdicts the jury had reached and to discharge the jury.

Lastly, in *People v. Conley*, 187 Ill. App. 3d 234, 543 N.E.2d 138 (1989), the jury was given four verdict forms for two counts of aggravated battery: one based upon permanent disfigurement and the other based upon great bodily harm. *Conley*, 187 Ill. App. 3d at 238. The

jury returned a guilty verdict on aggravated battery based upon permanent disfigurement, but failed to sign either verdict form with respect to the other charge. The State's Attorney did not object to entry of judgment on the verdict the jury returned and the trial court discharged the jury. On appeal, the *Conley* court concluded that the jury's silence on the aggravated battery based upon great bodily harm charge equated to an acquittal of the defendant on that charge. *Conley*, 187 Ill. App. 3d at 238. *Conley* is also distinguishable from the instant case for two reasons. First, the jury there was clearly silent; it failed to sign the form or state any reason for doing so. Conversely, in the instant case, the jury specifically and unequivocally stated it could not reach a verdict. Second, *Conley* did not involve a deadlocked jury as does the case before us.

In the instant case, the sole basis for declaring a mistrial was the fact that the jury was deadlocked, *i.e.*, it was simply unable to reach a decision on all counts and, as noted above, clearly and unequivocally stated so. The jury was not simply silent on those charges as in the cases relied upon by defendant–it was at an impasse. Defendant does not argue that the trial court abused its discretion in declaring a mistrial, nor that the basis for doing so was anything but a deadlocked jury. See *e.g.*, *Hobbs*, 301 Ill. App. 3d at 589. The jury, thus, did not make any finding or determination on defendant's actual guilt or innocence so as to constitute an acquittal. Moreover, the record does not demonstrate that the State agreed to any order dismissing the remaining charges. See *Daniels*, 187 Ill. 2d at 312. Rather, the record demonstrates the State's intent to retry defendant, as well as the trial court's belief that the State would do so. Lastly, the charges defendant was

retried on were not dependent upon or lesser or greater included offenses of aggravated kidnaping for which a not guilty verdict had been rendered in defendant's first trial. If they had been, as in *Thurman*, then retrial would have been barred.

Accordingly, we find that the State's retrial of defendant on two counts of aggravated criminal sexual assault and criminal sexual assault did not violate double jeopardy principles.

VI. Class X Sentence

Lastly, defendant contends that his Class X sentences were not only an abuse of discretion by the trial court because it failed to take into consideration defendant's mitigation evidence and rehabilitative potential, but were also illegal because they constituted double enhancement. The State contends that defendant waived review of this issue because he failed to object at trial. Substantively, the State maintains that defendant's Class X sentences were proper.

While we agree with the State that defendant waived this issue in failing to object at trial, waiver is a limitation on the parties, not on the court, and we, therefore, will address the issue on its merits. *People v. Lindsey*, 201 Ill. 2d 45, 67, 772 N.E.2d 1268 (2001). Moreover, with respect to the double enhancement issue, because such an error could result in an illegal sentence, we will also review the issue on its merits. *People v. Watkins*, 325 Ill. App. 3d 13, 17, 757 N.E.2d 117 (2001).

A. Abuse of Discretion

Defendant contends that the trial court never considered his mitigation evidence, in particular his job

skills, diploma, machinist certificate, and the fact he had a family. According to defendant, the trial court in its ruling never once mentioned mitigation. Rather, according to defendant, the trial court focused on its own personal opinions and disgust with rape.

The State contends that the trial court did not abuse its discretion in sentencing defendant to the maximum term based on the circumstances of the crimes, defendant's past criminal conduct, and the fact that defendant had a history of lying in wait for young victims. According to the State, defendant had a pattern of predatory and criminal behavior going back to 1979. In 1979, when he was 24 years old, defendant was convicted of deviate sexual assault and sentenced to seven years' imprisonment. The same year he was charged with aggravated criminal sexual assault, but the charge was dismissed because the victim could not be found. In 1982, after his release from prison, defendant was convicted of aggravated criminal sexual assault and unlawful restraint and sentenced to 15 years' imprisonment. In 1997, again after being released from prison, defendant was charged with possession of a controlled substance and sentenced to one year imprisonment. Lastly, defendant committed the instant offense while on parole. According to the State, it is clear that defendant had no rehabilitative potential.

"A trial court has wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation." *People v. Bilski*, 333 Ill. App. 3d 808, 819, 776 N.E.2d 882 (2002). We accord the trial court's determination as to the appropriate sentence great deference and will only reverse its decision if the court abused its discretion. *People v. Peshak*, 333 Ill. App. 3d

1052, 1069, 777 N.E.2d 554 (2002). In order for this court to find an abuse of discretion, the defendant "must affirmatively establish that the sentence was based upon improper considerations or was otherwise erroneous." *Peshak*, 333 Ill. App. 3d at 1069. In reviewing the trial court's decision, we "will not focus on a few words or statements by the trial court; rather, the record will be considered as a whole." *Peshak*, 333 Ill. App. 3d at 1069. We accord the trial court's decision great deference because it "is in the best position to take into account such factors as ' "the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age' [citation] [,] whereas the appellate court has to rely entirely on the record." ' [Citation.]" *Bilski*, 333 Ill. App. 3d at 819. Where the defendant presents mitigation evidence, the trial court is presumed to have considered it. *Bilski*, 333 Ill. App. 3d at 820.

In the instant case, while the trial court did not specifically identify the factors it relied upon and it rendered superfluous comments about the crime of rape, we nonetheless believe that the trial court did in fact consider the proper factors in reaching its decision. We note that the trial court is not required to recite the weight or value it gives to each relevant factor. *People v. Pinkonsly*, 331 Ill. App. 3d 984, 991, 772 N.E.2d 855 (2002). The trial court is also not required to give greater weight to defendant's mitigation evidence or rehabilitative potential than the seriousness of the offense. *People v. Lima*, 328 Ill. App. 3d 84, 100, 765 N.E.2d 64 (2002). Here, the trial court considered evidence presented in the presentence report, specifically refusing to consider certain evidence, including an alleged sexual assault committed by

defendant in 1979, because there had been no trial on the charge, and alleged improper comments defendant had recently made about the trial judge. The court then reviewed the facts of the incident and the seriousness of the offense. In this regard, it should be noted that the seriousness of the offense is the most important factor in sentencing a defendant. *Lima,* 328 Ill. App. 3d at 101. The trial court stated that defendant repeatedly "took what he wanted to" at "any expense." The trial court then noted that rape was not a crime of sex, but a crime of intimidation, force, and control. According to the court, defendant engaged in sexual assault to "show what a tough guy he was." The court then stated that it had no qualms about putting defendant in jail because defendant had earned his right to go to prison. Specifically, defenant had been to prison three times before and committed the instant offense shortly after his last release. The court believed that it needed to protect society, particularly women, from defendant. The court reiterated that defendant had made his own choice not to remain a free person through his own acts–defendant had a propensity for rape: a crime of violence and a crime that is very demeaning. Clearly, the trial court reviewed defendant's moral character, his prior criminal history, and his lack of rehabilitative potential based on the fact that defendant failed to learn from his past conduct or prior incarcerations. In light of the nature of the offense, including the fact that there was evideace that defendant forced A.S. at knife point to accompany him, and forced various and repeated sex acts upon her, defendant's lengthy criminal history, particularly involving prior assaults on women, and the clear necessity of protecting the public from further criminal conduct by defendant, we find that the trial court's sentence was not an abuse of discretion and

reversal is not justified by the record.[19] See *Pinkonsly*, 331 Ill. App. 3d at 991.

B. Double Enhancement

Defendant next contends that the trial court erroneously used the same set of prior convictions to upgrade two related counts, which it cannot do because such conduct constituted double enhancement.

The State contends that the trial court did not engage in double enhancement and that, based on his three prior convictions, defendant was required to be sentenced as a Class X offender. According to the State, the trial court used no single factor to establish an element of the offense and then again used it to lengthen the sentence. The State argues that because of his prior convictions, defendant was a Class X offender and he was required to be sentenced as such for both convictions, not merely one of them.

Double enhancement occurs when the trial court uses a single factor (such as a prior conviction) to

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[19] We note briefly that pursuant to section 12-13 of the Criminal Code of 1961, paragraph (b)(2), defendant was eligible for a Class X sentence of 30 to 60 years because he was convicted of criminal sexual assault after previously having been convicted of criminal sexual assault or its substantial equivalent. 720 ILCS 5/12-13 (b) (2) (West 1998). Moreover, under paragraph (b)(3), defendant was subject to a natural life sentence because he was convicted of criminal sexual assault after previously having been convicted of aggravated criminal sexual assault. 720 ILCS 5/12-13(b)(3) (West 1998). Clearly, the sentences imposed in the instant case were thus not an abuse of the trial court's discretion.

establish an element of the defendant's crime and then uses the same factor to impose a harsher sentence upon the defendant. *Watkins*, 325 Ill. App. 3d at 18-19. An example of such an error occurred in *People v. Hobbs*, 86 Ill. 2d 242, 427 N E.2d 558 (1981). There, the trial court used a former conviction of the defendant's to enhance the class of the defendant's current conviction and, then, used the same former conviction to increase the length of the defendant's sentence. *Hobbs*, 86 Ill. 2d at 245-46.

The Class X sentencing statute provides, in pertinent part:

> "When a defendant, over the age if 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted of any Class 2 or greater Class felonies in Illinois, and such charges are separately brought and tried and arise out of different series of acts, such defendant shall be sentenced as a Class X offender." 730 ILCS 5/5-5-3(c)(8) (West 1998).

The applicable sentencing range for a Class X offender is 6 to 30 years.730 ILCS 5/5-8-1(a)(3) (West 1998).

Here, defendant was convicted of a Class 1 felony–criminal sexual assault. He had twice before been convicted of a Class 2 or greater felony (deviate sexual assault and aggravated criminal sexual assault). Those two prior charges were separately brought, tried, and arose out of a different series of acts from each other as well as from defendant's two current convictions for criminal sexual assault. This is all that is necessary under this portion of the statute. *People v. Dunlap*, 315 Ill. App. 3d 1017, 1029, 734 N.E.2d 973 (2000). Any argument of defendant's to the contrary,

i.e., that this "separately brought" language must relate to his two current convictions, is erroneous since this argument was rejected by the court in *Dunlap*. *Dunlap*, 315 Ill. App. 3d at 1029. Accordingly, defendant was required to be sentenced under the Class X offender provision.

Here, the trial court used defendant's two prior convictions to increase his current two convictions for criminal sexual assault to Class X felonies. Thereafter, under the sentencing range for Class X sentences, the trial court imposed the maximum sentence. Thus, as in *Watkins*, once the trial court determined that it could properly use defendant's prior convictions to enhance his criminal sexual assault convictions to Class X felonies, the court no longer needed to consider the prior felonies for purposes of imposing a sentence. Rather, the court needed only to look at the sentencing range set forth in section 5-8-1(a)(3) of the Code of Corrections. 730 ILCS 5/5-8-1(a)(3) (West 1998). Accordingly, no improper double enhancement occurred.

Defendant does not challenge the fact that he was subject to a Class X sentence; rather, he contends that once the court concluded he was a Class X offender, it could only sentence him to a Class X sentence on one of his two current convictions, not both. Defendant fails to cite to any authority that the trial court could not sentence him to Class X sentences on both of his current convictions. Additionally, our independent research has disclosed no such law. Therefore, we find defendant's argument unpersuasive and we conclude that the trial court properly sentenced defendant.

CONCLUSION

For the reasons stated, we affirm the judgment of the circuit court of Cook County.

Affirmed.

BURKE, J., with McBRIDE, P.J., and CAHILL, J., concurring.

APPENDIX F

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

February 14, 2011

Before

MICHAEL S. KANNE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 09-1666

IRVING L. CROSS,
Petitioner-Appellant,

v.

MARCUS HARDY,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Div.

No. 1:05-cv-05692

William J. Hibbler, *Judge.*

ORDER

Respondent filed a Petition for Panel Rehearing and Rehearing *En Banc* on January 26, 2011. No judge asked for a vote on the petition for rehearing *en banc*, and all members of the panel voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing and rehearing *en banc* is DENIED.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
AUG 20 2011
OFFICE OF THE CLERK

No. 11-74

IN THE

SUPREME COURT OF THE UNITED STATES

MARCUS HARDY,

-vs- Petitioner,

IRVING L. CROSS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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3. There is no conflict among the Circuit Courts of Appeals or with this Court.

4. The petitioner's "Question Presented" is improper because it is a gross truncation and misstatement of the Seventh Circuit's analysis and holding.

5. A well-settled application of *Barber* and *Roberts* to facts is not an important federal question.

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No. 11-74

IN THE

SUPREME COURT OF THE UNITED STATES

MARCUS HARDY,	)	
	)	
	)	
-vs- Petitioner,	)	
	)	
IRVING L. CROSS,	)	On opposition to petition for
	)	a writ of certiorari to the
	)	United States Court of Appeals
	)	for the Seventh Circuit.
Respondent.	)	

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

The United States Court of Appeals for the Seventh Circuit granted the respondent habeas relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), because the state court proceedings adjudicating his claim resulted in a decision that was an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. *Cross v. Hardy*, 632 F.3d 356 (7th Cir. 2011). The Seventh Circuit deferred to the state appellate court for its knowledge of un-cited federal law but was compelled to find, based on *Ohio v. Roberts*, 448 U.S. 56 (1980), *Barber v. Page*, 390 U.S. 719 (1968), and *Berger v. California*, 393 U.S. 314 (1969), that the state appellate court did not reasonably apply federal law to the facts when the state appellate court rejected the constitutional claim.

Prior proceedings

The first trial was an Illinois prosecution on charges of aggravated kidnapping, aggravated criminal sexual assault, and criminal sexual assault.[1] The complainant had been an adult female who was stranded without bus fare at a bus-stop in Chicago on August 6, 1998, about four o'clock in the morning. (HP at 5) She had earlier refused a ride home from police after her current boyfriend had been arrested in his car. (HP at 5-6) Before the first trial, the trial court barred evidence of the complainant's prostitution, drug use, and arrest record. (HP at 6) At the first trial, the complainant testified on the charges and revealed that no other person witnessed the alleged offenses. (HP at 6) She took two minutes to answer each question. (HP at 6, Pet. Appen. E at 82a) The respondent argued to the first jury that, "Anybody who was in this room yesterday when [the complainant] testified . . . and saw her and heard her understands that she was not telling the truth." (OB at 45) The first trial ended in a verdict of not guilty of aggravated kidnapping and in a hung jury on the remaining counts. (OB at 13) Two days later, a victim-witness advocate for the State[2] advised the complainant of her need to re-testify. (OB at 16) The complainant appeared pale, depressed, and in tears but reluctantly said she would testify. (OB at 16, EXC. at 41) During the conversation, there was no promise to testify, either

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[1]The citations are to facts set forth in the 7th Circuit's decision and to the facts as set forth in supporting documents and briefs filed in this case, which were included in the 7th Circuit's record. These are: an excerpt from the state court trial proceedings, which was designated in the 7th Circuit as Exhibit #K pp. 1-71 ("EXC."); the opening brief on direct appeal ("OB"); the reply brief on direct appeal ("RB"); the decision on direct appeal, which is appended to the petitioner's certiorari petition ("Pet. Appen. E"); the rehearing petition on direct appeal ("RP"); the appeal to the Illinois Supreme Court ("PLA"); the habeas petition ("HP"); the reply to answer ("RA"); the certificate of appealability ("COA"); the opening brief in the 7th Circuit ("OB7"); and the reply brief in the 7th Circuit ("RB7"). The 7th Circuit's decision is referenced as ("Op.") The petitioner's petition is referenced as ("Cert. Pet.")

[2]The word "State" and the word "prosecutor" are used in this Brief interchangeably. As does the 7th Circuit, this Brief designates the state-courts as the state appellate court and the state trial court or "judge."

formal or informal. (RB7 at 8, 13, EXC. at 26-27, 40-41) The conversation did not occur in court but in the prosecutor's office after the complainant was taken with her mother by police. (EXC. at 25-26, 40, Pet. Appen. E at 45a) On the two occasions that the complainant had come into the court building, a detective had needed to escort her. (EXC. at 24-25, 25-26) The court declared a mistrial on November 3, 1999. The complainant was not under a subpoena or under the judge's warning to return to court, and the State did not remain in contact with her. (OB at 13, 38-39, 43, OB7 at 31, Pet. Appen. at 84a, 85a, EXC. at 25-26, 40)

Over four months later, on March 20, 2000, the State announced an inability to locate the complainant. (OB at 13) The State was satisfied with a seven-day continuance. (OB at 13, OB7 at 30) The State did not request a sixty-day continuance even though a sixty-day continuance was allotted under Illinois' speedy trial rules. (OB7 at 30); 725 ILCS 5/103-5(c). The State announced a plan to draft a motion to use a cold transcript in the complainant's stead, even before the seven-day continuance period had begun. (RB7 at 12-13) The State declared an intention, on this date, to try the case "with or without her." (RB7 at 12) Seven days later, on March 27th, the State moved to declare the complainant "unavailable," over objection, and to submit a transcript of her testimony. (OB at 13) The substance of the State's motion, which was unsworn, was the State's assertion of belief of the complainant's "every indication" to re-testify despite her "extremely frightened" state-of-mind. (RB7 at 15n. 5) The State's motion alleged, without specificity, a "constant contact" with the complainant and her mother by members of the Cook County State's Attorney's Office "without proffering a name or log of who, when, and where." (RB7 at 15n. 5) At a subsequent hearing on the motion, the State did not show that anyone—until March when the search commenced—had telephoned or visited even once. (RB7 at 15)

The coverage of the testimony at the hearing, regarding the State's contact with the complainant and lack thereof, dated back to the first trial. (RB7 at 15) At the hearing, the State presented the detective, the victim-witness advocate, and an investigator, who had checked the parents' two apartments, one former boyfriend's possible residence in Waukegan resulting in an interview with the boy's mother, various government agencies, and one "false" address over a less-than two-week period in March. (OB7 at 4) The case had been set for retrial since January, with a scheduled retrial date of March 29th, but the investigator had not been directed to locate the complainant until March 3rd. (Op at 4a, OB7 at 4) The detective had not started his search until March 12th. (OB7 at 4) The victim-witness advocate had learned of the Waukegan lead on March 10th, but the detective did not go there until March 21st or March 22nd. (EXC. at 33-34, 42) The State had declined to check the known street corners where the complainant had practiced her prostitution trade. (OB at 16, 21, RB at 5, EXC. at 58-59) No attempt had been made to interview a single friend or person on the street, including the complainant's current boyfriend and companions from the street on the night she was stopped. (OB at 16, 21, RB at 5, Op at 11a)[3] The State's people had spoken to the mother who had spoken to the complainant by telephone, shortly after March 10th, but their efforts were to repeat the same steps, including visits to the morgue and hospital, despite knowledge that the complainant was alive and well. (Op. at 11a, RB7 at 17-20) The mother separately told the detective and the victim-witness advocate that the

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[3]The petitioner's petition asserts and implies that "family and friends" were interviewed and were attempted to be interviewed. (Cert. Pet. 7, 14) Unless the Waukegan ex-boyfriend's mother could be called a "friend," there were no interviews or attempted interviews of friends. (Op. 11a, EXC. at 3-39) Furthermore, the appellate court did not find that the ex-boyfriend from Waukegan and the "old" male "friend" from Waukegan were two different people or were two different "friends" of the complainant's. (Pet. Appen. E at 45a, 46a) There was only one trip to Waukegan and only one destination attempted there. (Op. at 10a)

complainant had enrolled in a cosmetology school after the mistrial, but the detective did not obtain the name or location of the school or otherwise follow-up on this lead either. (Op. at 11a, EXC. at 31-32, 42, 58) The detective testified that the complainant had telephoned her mother two weeks earlier to claim having "run away" and to report a fear of returning to the city and testifying. (Op. at 5a, EXC. at 30) There was no indication that she had left the city permanently or left the metropolitan area. (EXC. at 30, 59) The detective never claimed that he tried to trace the telephone call. (EXC. at 30) At the hearing, as before, no subpoena was sought to be served at the mother's or father's home even though the complainant had been in telephone contact with the mother. (EXC. at 30, 58-59) No further contact by the State was attempted.

The respondent protested and stressed that "the transcript doesn't do justice" to the complainant's demeanor, which was "distracted," "uninterested," "hesitating," "spacey," "extremely scared or nervous," and "extraordinary" at the first trial. (EXC. at 52, OB at 16) The State concurred but said she was "traumatized." (OB at 45, RB at 8, EXC. at 55) The judge acknowledged that the complainant had taken two minutes to answer each question. (Op. at 4a, Pet. Appen. E at 82a) The respondent's objection was based on the State's lack of good faith and lack of diligence in returning the complainant to trial. (OB at 16) A ground for the Sixth Amendment objection was the complainant's availability, where all feasible efforts had not been made in good faith to secure the complainant's appearance for retrial. (OB at 16) The respondent objected to "just relying on the mother's word" and argued the State's failure to check certain prominent places that the complainant would frequent. (OB at 16, EXC. at 58, 59) The respondent alerted the court to the "very temporary situation" of the complainant's absence as not the equivalent of unavailability, especially because of the disadvantage to the respondent from the loss of the complainant's extraordinary demeanor. (OB at 16, EXC. at 51-54, 56-57, 59) The

judge ruled that her extraordinary demeanor was irrelevant and that the complainant did "not want to be found." (EXC. at 4, 67) The judge refused to "speculate" that the complainant could be found "in another month, or two, or three" if the State tried harder. (EXC. at 68, OB7 at 5) The judge relied exclusively on Illinois law despite the respondent's Sixth Amendment claim. (EXC. at 51, OB at 9a-14a) Over the respondent's objections, the trial court granted the State's motion to substitute the complainant's transcript. (OB at 40)

The case proceeded to retrial after the judge refused to reconsider the pretrial rulings. (OB7 at 6) Over objection, the complainant's testimony was read by a law student, who was employed as a clerk with the prosecutor's office. (OB at 16-17, 50) Over further objection, the law student read, with some inflection in her voice, that the respondent abducted the complainant at knife-point, whereupon they had sex in the grass. (HB at 8-9) The respondent's additional objection included the ground that the prosecutor may not have admonished the law student not to use any inflection in her voice. (Pet. Appen. E at 52a) The respondent spread of record, "she's acting." (Pet. Appen. E at 52a) The prosecutor denied having told her to act. (Pet. Appen. E at 52a) The court concurred that "slight inflection" was apparent in her answers regarding the sex and admonished the prosecutor, "Tell her to answer the questions." (Pet. Appen. E at 52a) The respondent persisted that the prosecutor had apparently failed to admonish the law student before trial "not to act" in the first place. (Pet. Appen. E at 52a) The respondent's objections to the reader, instead of a neutral court reporter, and to the reader's behavior as acting the sexual episodes were overruled. (OB at 16-17, 48, 49, 50)

Neither in defense, nor on cross-examination, were the complainant's prostitution, prior cocaine use, and arrests allowed. (OB at 52) As offers of proof, the complainant's doctor would have testified to the complainant's outcry from the incident that "[The] patient reports being a

'hooker' up to last week and has used rock cocaine." (OB at 52) The complainant had purportedly practiced her prostitution trade on the street corners of Division and Central Park, Division and Monticello, Central Park and Potomac, and Grand and Pulaski, which were the locales of her encounter with the respondent within areas known for prostitution, but the evidence of prostitution was excluded. (RP at 8, OB at 18, 52) As proffered, two of the complainant's arrests were for criminal trespass to a vehicle, and one arrest was for retail theft. (OB at 53) The respondent did not testify and blamed the adverse rulings. (OB at 10-11) The respondent proffered his testimony based on the police report of his custodial statement made contemporaneously upon arrest. (OB at 10-11) As proffered, he had consensual sex in exchange for drugs with the complainant whom he recognized as a prostitute. (OB at 10-11)

At closing argument, the respondent was further precluded from arguing to the jury the reasons for the complainant's absence, either to compensate for the loss of her demeanor or to undo the damage from the reader's dramatic inflection. (OB at 17) The court admonished the jury not to concern itself with reasons why the complainant was not present. (OB at 17) The second jury found the respondent not guilty of aggravated criminal sexual assault but guilty of two counts of criminal sexual assault. (OB at 25) The court sentenced the respondent to sixty years imprisonment. (OB at 26)

The respondent's direct appeal to the Illinois appellate court challenged: 1) that the State's use of a transcript of the absent complainant's former testimony, as read by a law student employed by the prosecutor, violated the respondent's Sixth Amendment right to confrontation, where cross-examination was inadequate, and where the State did not act in good faith to conduct a diligent search to obtain the reluctant witness, whom the State knew had a disinterested, distracted, and dubiously-credible demeanor from the first trial ending in an acquittal and a hung

jury; 2) that the State knowingly reaped an advantage at the second trial from the above circumstances and pattern of conduct; and 3) that the court's suppression of the complainant's prostitution, drug use, and arrest record denied the respondent his due process right to present a defense and his Sixth Amendment right to confrontation, where the proffered defense was consent during an act of prostitution in exchange for drugs, and where the complainant's credibility was critical. (OB at 37-38) Regarding the first claim, the respondent argued, *inter alia,* that a source as rudimentary as the yellow pages of the telephone book revealed only ten cosmetology schools in the metropolitan area. (RB at 5)

Rejecting these arguments, the Illinois appellate court upheld the use of the transcript of the former testimony, and the use of the reader, despite "acknowledging concerns" over the absence of live testimony where the absent witness was also the victim and sole eyewitness whose credibility was "perhaps incredible or uncredible." (Pet. Appen. E at 82a-83a) The appellate court believed that its hands were tied by the Illinois legislators, who had carved no "exceptions" to the former-testimony exception to the hearsay rule. (Pet. Appen. E at 82a-83a)[4] In determining that the complainant was "unavailable," the appellate court found "no authority" for the State to have maintained contact, no subpoena "requirement," and no duty to have

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[4]The Illinois appellate court's unwavering belief that its hands were tied by the Illinois hearsay rule is as follows: "[T]he Illinois legislature has promulgated a provision that excuses the presence of live testimony when a witness is unavailable. It is logical to infer that the legislature, when doing so, was aware of the fact that because the witness would not be present, his or her demeanor could not be judged. However, the legislature made no exceptions in the act for either certain kinds or classes of witnesses, or when the witness' prior testimony is alleged to be uncredible. Similarly, our independent research has not revealed any Illinois case law providing for such exceptions or for excluding an unavailable witness' prior testimony because the credibility of that witness is deemed crucial. Thus, although we acknowledge the concerns with respect to the lack of live testimony, particularly where it involves the sole witness and credibility may be crucial, based on Illinois law, we decline to hold that [the complainant] A.S.' testimony was inadmissible because she was the sole eyewitness and perhaps incredible or uncredible. Accordingly, we must determine whether the State met its burden of establishing that A.S.' prior recorded testimony was admissible pursuant to the above-enunciated exception to the hearsay rule." (Pet. Append. E at 82a-83a)

investigated at any length including the locales of the complainant's practice of her prostitution trade and all of the other identified missed opportunities. (Pet. Appen. E at 84a, 85a) Although the respondent had cited the seminal case of *Barber v. Page*, 390 U.S. 719 (1968), the Illinois appellate court declined to address any High Court authority beyond a passing reference to *Ohio v. Roberts*, 448 U.S. 56 (1980). (Pet. Appen. E at 74a-85a) Although the respondent's constitutional claim was based on a combination of the State's conduct and omissions pursuant to law from the United States Supreme Court—and although the respondent was not advocating "requirements" or *per se* rules for each factor— the appellate court declined to weigh factors in their factual constitutional totality but isolated them as a matter of Illinois or other lower court law. (Pet. Appen. E at 74a-85a) The only factor deemed pertinent by the Illinois appellate court to respondent's constitutional claim was the prosecutor's employment of more than one assistant to "detail" or "coordinate" the State's search for the witness, regardless of the brevity of the search, a lack of quality to the search, the recency of the absence, or any other circumstance. (Pet. Appen. E at 83a, 84a) The appellate court affirmed the convictions and sentence. (Pet. Appen. E at 36a) A petition for rehearing, persisting in the complainant's "availability" based on the known streets of the complainant's prostitution trade, was denied. (RP at 8, OB7 at 9)

The respondent filed a petition for leave to appeal to the Illinois Supreme Court, which raised the same constitutional grounds for relief. (PLA) To the highest state court, the respondent argued that Illinois had not attempted to remain in contact with the witness, seek a subpoena, request a bench warrant, or search for the witness for a reasonable time. (PLA at 2, 12-14) Without giving reasons, the Illinois Supreme Court denied the petition for leave to appeal. *People v. Irving Cross*, 205 Ill. 2d 600, 803 N.E.2d 488 (#96521, 10/7/03). The respondent filed

a petition for a writ of certiorari, which requested an interpretation of *Crawford v. Washington*[5] to assure a remedy under the constitution when face-to-face confrontation is necessary on retrial and because of the suppression of the three categories of impeaching evidence. The petition for a writ of certiorari was denied. *Irving Cross v. Illinois*, 543 U.S. 822 (2004).

In the district court, the respondent filed a petition for a writ of habeas corpus citing High Court precedent for all of the previous claims, including the claim under *Barber v. Page* and *Ohio v. Roberts*. (HP at 10-22) The district court rejected the respondent's constitutional claims but issued a written order granting the certificate of appealability, as follows, to be reviewed by the Seventh Circuit Court of Appeals:

> "Whether the State of Illinois engaged in a good faith effort to locate the complaining witness prior to [the respondent Irving] Cross' second trial, which if it had not, would have demonstrated that [the respondent Irving] Cross' conviction violated the *Sixth Amendment* to the United States Constitution." (COA, p. 2)

The district court's reasoning, in granting the certificate of appealability, was Illinois' brevity and lapse in searching for a "hesitant" witness, whose leads were left un-pursued, as constituting unreasonable efforts under the constitution. (COA, p. 2) Based on the certificate of appealability, the respondent appealed to the Seventh Circuit Court of Appeals. The respondent argued to the Seventh Circuit, pursuant to AEDPA, that:

> " The Illinois Reviewing Court Did Not Measure Or Reasonably Find That The Complaining Witness Was Constitutionally 'Unavailable,' Especially Where The Prosecutor's Conduct Toward The Witness After A Hung Jury Fell Short Of The Confrontation Clause Standard For Good Faith." (OB7 at 15)

In support, the respondent argued that the basic litmus of "unavailability" is well-established by

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[5]*Crawford v. Washington*, 541 U.S. 36 (2004), was pending and was decided during the pendency of the respondent's certiorari proceedings in 2004.

Barber v. Page and *Ohio v. Roberts,* as well as additional high court precedent with solid roots for over 100 years, which the Illinois courts applied wholly unreasonably. *Barber v. Page*, 390 U.S. 719 (1968); *Ohio v. Roberts,* 448 U.S. 56 (1980) *[overturned on other grounds]*. As argued by the respondent, the Illinois courts had unreasonably accepted as constitutionally diligent a prosecutor's multiple conspicuous failures to assure the live appearance of its sole accuser despite the particular circumstances. (OB7 at 15, 20-26, 30-32) As argued by the respondent, the Illinois courts had unreasonably dismissed as "irrelevant"--- or "not required"--- those circumstances that *Barber v. Page* had deemed key to the outcome of the habeas claim therein, and that *Ohio v. Roberts* had deemed certainly "relevant" to an analysis of a prosecutor's lack of good faith. (OB7 at 21, citing *Barber v. Page*, 390 U.S. at 725 [holding that the failure even to attempt to utilize court process—therein a writ of *ad testificandum*—was fatal to the State's position, because the importance of live testimony could "not be dispensed with lightly"]; *Ohio v. Roberts,* 448 U.S. at 74 [holding that "[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation"]. To the Seventh Circuit, the respondent debunked the irrational rote refrain of the Illinois judges who, under the guise of rejecting "absolute bars" on former testimony, unreasonably abdicated the constitutional responsibility to weigh the factors and circumstances in determining if the prosecutor acted with the diligence due. (OB7 at 24, RB7 at 2) To the Seventh Circuit, the respondent exposed the unreasonable and the subverted refusals of the state appellate court, and the state trial court, to apply the federal law to the facts. (OB7 at 24-30, 30-33)

The Seventh Circuit's decision

The Seventh Circuit found that the respondent met his burden under the well-established habeas standard. (Op. at 7a, 14a) The Seventh Circuit found a violation of the respondent's Sixth

Amendment right to be "confronted with the witnesses against him," as implemented by *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) and *Barber v. Page*, 390 U.S. 719, 724-25 (1968). (Op. at 8a) The Seventh Circuit concluded that the state trial court and appellate court unreasonably applied federal law to the facts in determining that the complainant was constitutionally unavailable. (Op. at 14a) The Seventh Circuit denied rehearing. (Pet. Appen. F at 121a) No judge asked for a vote on the petition for rehearing en banc, and all members of the panel voted to deny the petition for rehearing. *Id.*

REASONS FOR DENYING THE WRIT

The Seventh Circuit did not misstate the standards in this case and gave state courts the deference that was due. Lacking a conflict with this Court's case law or a conflict between Circuits, the petitioner is misstating the holding and language of the Seventh Circuit's decision, which did not impose a requirement on a prosecutor to serve a subpoena. The petitioner has no valid quarrel with the respondent's well-settled and rarely litigated claim. The petition for a writ of certiorari should be denied.

I.

THERE IS NO CONTROVERSY OR FEDERAL QUESTION FOR REVIEW.

1. The Supreme Court precedent of *Roberts* and *Barber* is "clearly established."

The Seventh Circuit followed AEDPA by relying on the clearly established supreme court precedent of *Roberts* and *Barber*. The Seventh Circuit identified the federal law and the federal supreme court precedent that require a habeas petitioner to prove both: 1) the State's failure to exercise good-faith diligence to bring a witness-accuser to trial, which is necessary to satisfy the Sixth Amendment; and 2) the state-courts' unreasonable determination of the accuser's Sixth

Amendment "unavailability" pursuant to clearly established supreme court decisions. (Op. at 2a)

Pursuant to this standard, the Seventh Circuit cited supreme court precedent of *Barber v. Page*, 390 U.S. 719 (1968), *Berger v. California*, 393 U.S. 314 (1969), and *Ohio v. Roberts*, 448 U.S. 56 (1980) and recited or summarized their holdings. (Op. at 8a-9a, 13a) *Roberts* particularly embraces *Barber* and *Berger* and clearly establishes that whereas reasonableness is the overall standard, certain "rules," "propositions," and "refinement" to reasonableness "safely-emerge." *Ohio v. Roberts*, 448 U.S. at 74. Among the refinements or safely-emerged propositions in *Roberts* are that non-futile acts should be diligently pursued, and that "affirmative measures may demand [to be] effectuat[ed]." *Ohio v. Roberts*, 448 U.S. at 74. (Op. at 9a, 13a) *Roberts* formally adopts, as a **"rule"**, *Barber*'s underpinning that "the possibility of a refusal [of information] is not the equivalent of asking and receiving a rebuff."[6] *Roberts* cites *Barber v. Page, California v. Green*, 399 U.S. 149 (1970), and *Berger v. California* for the refinement listed in *Roberts*, as

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[6]The holding of *Ohio v. Roberts* reads, in full, as follows: "The basic litmus of Sixth Amendment unavailability is established: '[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.' *Barber v. Page, 390 U.S., at 724-725* (emphasis added). Accord, *Mancusi v. Stubbs, supra; California v. Green, 399 U.S., at 161-162, 165, 167, n. 16; Berger v. California, 393 U.S. 314 (1969).* Although it might be said that the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge. The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), 'good faith' demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. 'The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.' *California v. Green, 399 U.S., at 189, n. 22* (concurring opinion, citing *Barber v. Page, supra).* The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate. . . We accept as a general rule, of course, the proposition that 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.' *Barber v. Page, 390 U.S., at 724."* *Ohio v. Roberts*, 448 U.S. at 74-75 & 76.

invoked by the Seventh Circuit.[7] The *Roberts* rule and accompanying principles are thus squarely established by this Court.

The use of a subpoena is not required as a matter of law but is one of *Roberts'* principles from *Barber* that the state appellate court refused to acknowledge, and that the prosecutor failed to utilize despite opportunities. *Roberts*, 448 U.S. at 74. As cited by the Seventh Circuit, *Barber* granted habeas relief for the prosecutor's failure to use court process, plus *Barber* held that face-to-face confrontation may not be dispensed with "lightly." *Barber*, 390 U.S. at 725. Accordingly, *Berger* applied *Barber* retroactively and directed a state-court to weigh the same type of factors----i.e., the lack of a subpoena, the unreasonable reliance on informal methods like telegrams and phone calls, and the lack of opportunity to assess the particular witness' credibility-----which controlled the Seventh Circuit's analysis too. (Op. at 7a-14a) The Seventh Circuit was applying the federal supreme court precedent----that contains the "safely-emerge[d]" "refinement[s]"---- entirely consistently with AEDPA's dictates. *Ohio v. Roberts*, 448 U.S. at 74.

The Sixth Amendment clearly establishes a lesser or greater degree of diligence dependent on the case. *Ohio v. Roberts*, 448 U.S. at 74. This is "clearly established" federal law because the language of diligence "due", or the varying degrees of effort, stems directly from the *Roberts* supreme court precedent. *Ohio v. Roberts*, 448 U.S. at 61 & 74. *Roberts* holds that the "**lengths to which a prosecutor must go** to produce a witness" must vary as a matter of reasonableness. *Ohio v. Roberts*, 448 U.S. at 74 (emphasis added) [wherein a lesser degree of diligence to keep track of a witness would be reasonable because the witness was merely a rebuttal witness whom the State had no pre-trial inkling of a future desire for her testimony]. A prosecutor's lack of due

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[7]See footnote #6 *supra*.

diligence is measured not by a prosecutor's doing nothing but by his pattern of conduct and omissions under the circumstances of the case. *Ohio v. Roberts*, 448 U.S. at 74. Accord, *Berger*, 393 U.S. at 314-15 [adopting *Barber*'s importance of a subpoena or comparable writ, even though the defendant's relatives and employer had been contacted and telegrams had allegedly been received from him]. Applying *Roberts*, the Seventh Circuit did not apply an incorrect and "more ambitious" standard but the only standard that is allowed. (Cert. Pet. at 18); *Ohio v. Roberts*, 448 U.S. at 74.

The petitioner has overlooked that the holding and standards, as used and invoked by the Seventh Circuit, are direct quotations from *Roberts* itself—i.e., the rule regarding "affirmative measures" and the rule regarding "the lengths a prosecutor must go." *Roberts*, at 448 U.S. at 74 [also citing *California v. Green*, 399 U.S. at 189]. The *Burns* case, which is not the Seventh Circuit's "own" independent law (Cert. Pet. at 9-10, 16-17), **is quoting *Roberts* verbatim**. *Burns v. Clusen*, 798 F.2d 931, 937 (7th Cir. 1986), *citing Ohio v. Roberts*, 448 U.S. at 74. The quotation on "affirmative measures" being demanded and effectuated **originates in *Roberts***. Thus the petitioner's assertion of no "specific guidance" within this Court's decisions is mistaken. (Cert. Pet. at 14) *Roberts* contains the "safely-emerge[d]" fundamental principles used in this case.

The petitioner's attack on lower federal case law is confusing the mere application of clearly established supreme court precedent with a substitution of federal cases for law that is otherwise devoid of supreme court precedent in the first place. (Cert. Pet. at 18, *citing* cases lacking supreme court precedent). There is nothing forbidden or even unorthodox in a habeas court's supplemental use of federal applications of clearly established supreme court law. This Court's "unavailability" principles in *Barber* and *Roberts* are well understood by federal courts,

because they are well-established dating-back decades. These unavailability rules for the Sixth Amendment, whose strictness and clarity were reiterated in *Crawford*, are not open questions. *Crawford v. Washington*, 541 U.S. 36, 44 & 68 (2004). There is nothing controversial concerning the importance of a subpoena, which every prosecutor knows may "demand to be effectuated", in accordance with *Roberts'* principles, to demonstrate good faith. Every prosecutor knows, in accordance with *Roberts* and *Barber* and *Berger*, that a subpoena is important to deter a witness from fleeing and to empower an entire police department to apprehend and bring the witness to court. In accordance with *Roberts*, there is nothing un-established in treating a State's failure to subpoena a witness, as one of several and numerous failures or missteps, especially when the witness is the complainant. The quantum of effort to be expended, dependent on the importance of the witness and her proclivity to disappear, is not only grounded in *Roberts*, but is a matter of common sense. (Op. at 11a); *Cook v. McKune*, 323 F.3d 825, 835-36 (10th Cir. 2003). The Seventh Circuit's analysis, like *McKune*'s construing *Roberts*, unassailably recognizes that the Sixth Amendment stakes are commensurately higher when the witness is the sole accuser and the sole eyewitness. (Op. at 11a-12a). If anything, the added federal applications only buttressed the inescapable conclusion of the unreasonableness of the state court's opinion. The petitioner seeks to overturn the Seventh Circuit despite its meticulous and well-grounded constitutional reasoning in favor of petitioner's ungrounded embrace of unreasonable state-courts. This is not AEDPA's purpose.

2. The Seventh Circuit's decision is correct and should not be disturbed.

The Seventh Circuit Court of Appeals correctly relied on a combination of facts and circumstances to measure the lack of good-faith diligence by the prosecutors to obtain the live

witness for retrial and the unreasonableness of the state court's determination thereon. (Op. at 10a-14a) These were:

> the State's ample notice of the complainant's extreme reluctance re-testify and of the complainant's probable attempt to evade it, yet the State did nothing about it until the eve of retrial (Op. at 12a-13a);
> the State's failure to talk to several people who might have known of the complainant's whereabouts, such as her current boyfriend, friends in the Chicago area, or persons at the beauty school that she had been attending (Op. at 11a, 14a);
> the State's conduct, instead, to duplicate previous efforts that the State knew had failed (Op. at 10a, 14a);
> the State's failure to issue a subpoena even though the complainant had lived at the mother's address, and even though the mother had been in contact with the complainant (Op. at 12a-13a); and
> the State's incentive to avoid locating the complainant, since she was a crucial witness whose testimony had been "pause-filled and evasive," whereas a reader could give a far better performance. (Op. at 11a-12a)

The Seventh Circuit was relying on the totality of the circumstances, for *Roberts*, as required.

The Seventh Circuit correctly applied the standard of habeas review. The Seventh Circuit relied on AEDPA and quoted AEDPA accurately and in full. Reciting AEDPA, the Seventh Circuit utilized and knew that a state court's adjudication cannot be overturned unless the adjudication is an unreasonable application—and not merely an incorrect application—of clearly established federal law as articulated by supreme court precedent. *Williams v. Taylor*, 529 U.S. 362 (2000).

Time and again, the Seventh Circuit repeated the deferential standard of "unreasonable application." (Op. at 2a, 7a-8a, 9a, 14a) The Seventh Circuit's pronouncements never wavered from the correct framework of "unreasonable application" as the "central question on appeal." (Op. at 9a) Articulated as the "central question" was "whether the state appellate court unreasonably applied Supreme Court precedent when it affirmed the trial court's unavailability determination." (Op. at 9a) The Seventh Circuit included an additional statement of deference

that the conclusion was "not reached lightly." (Op. at 14a) The Seventh Circuit was stating that the state-court's focus needed to be the "reasonable and diligent measures," which were found to be wanting and unreasonable pursuant to the habeas petitioner's burden of proof. (Op. at 7a, 9a) In measuring the state-courts, the Seventh Circuit emphasized that the government is **not** required to do "everything it can to get a witness to testify," which afforded the State considerable latitude. (Op. at 9a)

The Seventh Circuit referred to the findings and grounds for the rulings from the state courts. (Op. at 4a-14a) The Seventh Circuit took into consideration the trial court's ruling that the complainant "did not want to be found" and the appellate court's characterization of the short and belated search as "extensive" when the Seventh Circuit reviewed the case under *Roberts* and AEDPA. (Op. at 6a, 9a-10a, honoring AEDPA's well-settled provision authorizing habeas relief when an adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(2)). The Seventh Circuit's inquiry was "reasonable" diligence not simply the due diligence inquiry on direct review. (Op. at 9a) Had the stage been a direct appeal, the record supports a determination that diligent actions would have been successful, but the Seventh Circuit's opinion exercised restraint.

The Seventh Circuit deferred to the state appellate court for its knowledge of un-cited federal law, even though the state appellate court did not measure the prosecutor's diligence under the refinements or components of the *Roberts'* rule. (Pet. Appen E. at 74a-85a) In so deferring, the Seventh Circuit exposed the unreasonableness of the state appellate court's analysis and conclusion with utmost respect. (Op. at 9a-14a) The Seventh Circuit exposed the

unreasonableness of the state courts by objectively setting forth the state tribunals' unreasonable adjudications in view of the prosecutor's conduct under the circumstances of-record. (Op. at 9a-14a) The Seventh Circuit found that the "extensive search" remark was refuted by the record of duplication of unsuccessful steps when other steps were known, available, and yet conspicuously untried. (Op. at 9a-11a) At the same time of the State's neglect of known leads, the State took steps known to be unreasonable: to wit, mechanically visiting the morgue when the mother said she was alive and had been speaking by telephone. (Op. at 10a) The complainant had expressed to the prosecutor her tremendous reluctance to re-testify as early as the date of the mistrial in November, which was repeated by the mother on March 3rd, but the State took no additional step until March 10th to locate or contact her. (Op. at 12a-13a) Even then, the State repeated the same steps when the State knew that other steps could be tried. (Op. at 10a) Throughout a period of four months, none of the available proactive measures, such as subpoenas or bench warrants or informal visits, were ever used or even attempted, despite knowledge of the complainant's address and the use of subpoenas in *Ohio v. Roberts* and the pivotal use of court process in *Barber v. Page*. (Op. at 10a-14a) No fairminded jurist or prosecutor could rule-out knowledge of the complainant's whereabouts by teachers, friends, and classmates at the beauty school, at which she had enrolled after the mistrial, yet the known and recent lead of the school was not explored by anyone. (Op. at 11a, RB7 at 18, EXC. at 31-32, 58) The known sources of the current boyfriend and the known streets of the complainant's prostitution were likewise glaringly and unreasonably ignored. (Op. at 11a, OB7 at 31) Unlike the unreasonable state courts, the Seventh Circuit did not refuse to consider the prosecutor's knowledge of the complainant's extreme reluctance to re-testify, her proclivity of disappearing, her importance in both demeanor and role, and the omission

of known steps that a diligent and reasonable prosecutor would be expected to take for a witness who is most important to both sides. (Op. at 11a-14a)

Indeed, the Seventh Circuit accepted the state-courts' factual finding of the complainant's demeanor at the mistrial and further grounded its statements of the importance of the complainant's demeanor in her pause-filled answers at the first trial, which the prosecutor then preferred to replace with a transcript and reader who was a better speaker than the complainant. The facts showed this prosecutorial course of conduct of urging the use of the reader, over the respondent's objection, despite the recency of the complainant's absence, the recency of a lead, and the unreasonable neglect of current friends and known streets. (OB at 48)

In sum, the Seventh Circuit was finding that the state appellate court was unreasonably applying *Roberts, Barber,* and *Berger* to the facts of the State's behavior. 28 U.S.C. § 2254(d)(1) & (d)(2). The state appellate court was unreasonably construing the federal law during the corrupted process of the erroneous and unreasonable application to the facts. 28 U.S.C. § 2254 (d)(1) & (2). The state court's erroneous treatment of the prosecutor's behavior and omissions was so indefensible, under these clearly established Supreme Court precedents, to be an unreasonable application warranting the respondent's habeas relief. There is no reason to review the Seventh Circuit's decision.

3. There is no conflict among the Circuit Courts of Appeals or with this Court.

There is no conflict in authority. The decision of the Seventh Circuit is based on *Barber*, *Berger* and *Roberts*, whose fundamental governing principles are the same as the Seventh Circuit's. No Circuit Court case or case from this Court holds that a comparable violation of *Roberts*, *Barber*, and *Berger* is not entitled to habeas relief. The State does not even allege a

conflict regarding the right to habeas relief under these circumstances. The petitioner is the party who is unaligned, because the petitioner departs from *Roberts'* reasonableness analysis by seeking, instead, to forbid a federal court from ever considering the failure to subpoena, the subpoena's proactive usefulness, or the witness' importance to a Sixth Amendment right.

Nor is there a split in the circuits or a conflict with this Court over proactive measures, because the Seventh Circuit never held that there is such a requirement, and no Circuit has held that they may never be factors. The petitioner's five citations do not conflict with the Seventh Circuit, because they, too, follow *Roberts*[8] and allow—and do not disallow— the consideration of a subpoena as a factor. (Cert. Pet. at 19-21) Indeed, in suggesting otherwise, the petitioner either mis-characterizes their holdings or omits their salient facts. *United States v. Johnson*, 108 F.3d 919 (8th Cir. 1997) [accepting good faith because the failure to subpoena involved a minor unimportant witness]; *Christie v. Hollins*, 409 F.3d 120 (2d Cir. 2005) [excusing a defense attorney's lack of a subpoena on a friendly defense witness, where actual messages were indeed communicated between trials, albeit mis-communicated by a third party, unlike the wholesale abandonment here of contact and of leads, after a mistrial, by the prosecutor]; *Poe v. Turner*, 490 F.2d 329 (10th Cir. 1974) [involving no un-pursued leads of a missing witness from Utah except that "it was said" he had applied for employment on a railroad somewhere "in the midwest", and involving a second witness who had moved "somewhere in the state of New York" but "had testified only briefly, and on a matter that was not a real issue"]; *Martinez v. Sullivan*, 881 F.2d 921 (10th Cir. 1989) [observing that the State had twice subpoenaed the witness, telephoned him, purchased his airplane ticket, mailed him a travel itinerary, placed him on an unrelated bond, and

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[8]One citation, *Poe*, is pre-*Roberts* but it matches *Roberts* good-faith equivalent.

reasonably believed that his incentive to remain free on bond would prevent him from skipping]; *Dres v. Campoy*, 784 F.2d 996 (9th Cir. 1986) [involving a prosecutor's decision not to re-arrest a minor, who had already been under subpoena, based on the prosecutor's particular trepidation over keeping a juvenile for "three weeks" in jail].

In *Dres*, a tactical decision to forego a subsequent material witness warrant was honored also because the re-arresting of the minor a second time was the only step that the prosecutor had not taken, which is a far cry from the pattern of missed opportunities that comprised the Seventh Circuit's analysis here. Wholly consistent with the Seventh Circuit, *Dres* embraces *Barber*, as well as *Roberts*, and reiterates that securing a witness' informal word is ordinarily an insufficient indication of a prosecutor' good faith to obtain the witness when a prosecutor is on notice of an uncooperative adult in danger of flight. *Dres*, citing *People v. Masters*, 134 Cal. App. 3d 509 (1982), citing *Barber v. Page*. Thus, the Seventh Circuit is not "impossible to reconcile" with the Ninth Circuit, whose divergent facts are readily distinguishable and whose embrace of *Barber* is without a doubt. (Cert. Pet. at 20)

Entirely consistent with these Circuit Courts, the Seventh Circuit never intimated that good faith requires a subpoena of a witness who has no recent known address (*Poe*). The Seventh Circuit explicitly agreed that a lesser effort exerted toward a minor witness is constitutional (*Johnson*). The Seventh Circuit, having stated that "everything" need **not** be done (Op. at 9a), consistently disagrees that "every lead, no matter how nebulous, must be tracked to the ends of the earth" (*Poe*). The Seventh Circuit would accept that a prosecutor who is confronted with a juvenile witness could be making other comparable arrangements to secure her appearance besides sending and keeping the minor for many weeks in jail (*Dres*). The Seventh Circuit agreed

that *per se* rules for a particular method are not the test of unconstitutionality (*Martinez*). The petitioner's assertion of conflict with these cases is the petitioner's invention.

No conflict arises with *Harrington v. Richter*, 131 S. Ct. 770 (2011) and *Yarborough v. Alvarado*, 541 U.S. 652 (2004), which address the habeas standard for general versus specific constitutional rules based on a continuum. (Cert. Pet. at 13) There is no debate over the principle that the more general the rule, the greater the leeway afforded to state courts. (Cert. Pet. at 13) In this case, there are the narrowing principles in *Roberts* itself, which have existed in *Roberts* for over thirty years. *Ohio v. Roberts*, 448 U.S. at 74. Thus, the petitioner's understatement—if not misstatement— of the *Roberts*' rule as a "general rule" of solely "reasonableness" and "good faith" should not remain unnoted. (Cert. Pet. at 13-14) The *Roberts/Barber* claim is not purely a generalized rule, akin e.g., to *Strickland's* rudderless one, but a standard "refined" by the "safely emerge[d]" principles. *Ohio v. Roberts*, 448 U.S. at 74. *Roberts*' pronouncement of the non-performance of a "futile act" is itself narrow and non-speculative because *Roberts*' primary example of futility is "the witness' intervening death." *Roberts*, 448 U.S. at 74. The seminal later case of *Crawford*, while not applying retroactively to this case, alludes to the "relatively strict rules of unavailability." *Crawford*, 541 U.S. at 44. No case has ever conflicted with the Seventh Circuit's treatment and held that any heightened or different statement of deference beyond AEDPA's deference applies. Unless and until a federal circuit creates a conflict, there is no controversy to be decided.

Suffice it to add that the petitioner's inability to identify a controversy in the case-law is not surprising. Unlike other claims having a "reasonableness" standard, a *Roberts* claim is not stymied by a presumption of competence— or by a possible myriad of general off-the-record

strategies---- but encompasses a qualitatively different obligation to bring a witness to trial which is specific, verifiable, and clear-cut. Whereas a prosecutor may comply with the objective good-faith requirement by an assortment of methods, a prosecutor has no strategic choice or leeway to avoid live testimony and obtain an unfair advantage at a second trial. There is no "presumption" that a prosecutor who fails to bring a live witness to trial is acting reasonably, because there is no "strategy" or adversarial strategies, to avoid live testimony, permitted to a prosecutor. If anything, a prosecutor's strategic choice to avoid live testimony is the epitome of bad faith. No case creates a conflict, and no case creates a "presumption" of prosecutorial reasonableness. The petitioner's intimation of a higher standard of review beyond AEDPA's deferential standard relies on nothing. In sum, the petitioner identifies no conflict. There is no split of authority for this Court to resolve.

4. The petitioner's "Question Presented" is improper because it is a gross truncation and misstatement of the Seventh Circuit's analysis and holding.

The Seventh Circuit did not overturn the state court conviction "on the ground that prosecutors could have done more" than "superhuman efforts" to ensure the complainant's appearance at trial. (Cert. Pet. at i) The Seventh Circuit's decision is not parochially based on speculation that "more could be done" but on a broad pattern of conduct, of both behavior and neglect, regarding leads and opportunities known to the State, including how the State dealt with the matter of its most important witness. (Op. at 7a-14a) "Superhuman" effort is not an historical fact, and AEDPA's deference rule does not bind federal courts to a state-trial judge's off-the-cuff remark, hyperbole, or untenable and unreasonable choice of a word. 28 U.S.C. 2254 (d)(2). *Roberts* holds that the "lengths a prosecutor must go" must depend on the nature of the case. *Ohio v. Roberts*, 448 U.S. at 74. Under *Roberts*, a short, belated, mechanical, and less-than thorough investigation was obviously not "superhuman," especially when the most important

witness was at stake. An insufficiency of "superhuman" effort and a speculation that more "could have been done" were not the holding or analysis in this case. (Op. at 7a-14a) The petitioner's "Question Presented" is not presented by this case---even aside from the failure to present a proper and important certiorari question for review.

5. A well-settled application of *Barber* and *Roberts* to facts is not an important federal question.

The rarity of litigation on unavailability violations further diminishes the importance of this case to anyone but the parties. Unavailability claims are rare, due to the enormity of tools in the State's arsenal to present its witnesses, the well-settled law, and the infrequency of both losing and needing the live witness for a re-prosecution. In the future, the "indicia of reliability" test for the absent witness' extraordinary demeanor will seldom still be litigated, because *Crawford* has superseded *Roberts* on this other criterion. Few prosecutors will behave so badly as not to subpoena, not to maintain contact, not to look very long, and not to pursue leads for its most important witness. Few prosecutors will behave so brashly as to pursue a course of repeated neglect and then present a better speaker to replace a pause-filled evasive complaining witness following a partly hung jury and acquittal. Review of this case is unwarranted where review of the merits would be a vacuous exercise, and where the extremity of the prosecutor's aberrant behavior is unlikely ever to happen again.

The Seventh Circuit did not impose "duties." (Cert. Pet. at 11, 17) The Seventh Circuit never stated that subpoenas are "required" in every case or in "every case where the witness is 'critical' and the State learns of 'her reluctance to testify and her proclivity to disappear without informing anyone of her whereabouts.' " (Cert. Pet. at 10) On the contrary, the Seventh Circuit emphasized that subpoenas were **not** a requirement but merely a factor among other facts. (Op. at

12a-14a); *Barber v. Page*, 390 U.S. at 724-725 [wherein the failure to attempt a writ of *ad testificandum* was a decisive factor for a lack of good faith in a pre-AEDPA habeas case]. The State's failure to subpoena the witness was merely one factor, among many, contributing to the conclusion of the unreasonableness of the state court judges, who refused to consider it or weigh the factors in context. (Op. at 14a) A subpoena was not a "duty" but "one such measure" among other measures----(like obtaining a material witness arrest warrant, or maintaining contact with the witness after the mistrial, or resuming contact with the witness before the proverbial eve of trial, or interviewing the current boyfriend, or pursuing the mother's lead on the beauty school)----none among them being tried. (Op. at 11a, 12a, 13a, 14a) The petitioner is twisting the Seventh Circuit's analysis and misstating its words. All the Seventh Circuit did was apply settled law to facts.

The Seventh Circuit's decision is a fact-bound grant of habeas relief that does not present any novel question concerning how to interpret or implement AEDPA, in contrast to cases like *Harrington* and *Pinholster*. *Harrington*, 131 S. Ct. at 783 [applying AEDPA's adjudication requirement to state courts' summary denials]; *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) [resolving the complicated legal conundrum of the viability of evidentiary hearings on habeas claims of ineffective assistance of counsel]. There is no legal or open question in the petitioner's case. The petitioner appears to be seeking a *de novo* review by this Court to make an overreaching decision to permit the irrational decision of the state-court to stand. Nowhere does the petition allege that the Seventh Circuit improperly stated AEDPA or *Roberts*. The petition is not worthy of certiorari where Rule 10 does not favor a petitioner's assertions of "erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10.

CONCLUSION

For the reasons stated, the respondent prays that this Honorable Court deny a writ of certiorari.

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REPLY BRIEF

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No. 11-74

In the Supreme Court of the United States

MARCUS HARDY, Warden,
PETITIONER,

v.

IRVING L. CROSS,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The certiorari petition showed that the Seventh Circuit, on habeas review, improperly second-guessed the Illinois courts' application of Supreme Court standards for determining whether a witness is "unavailable" for Sixth Amendment purposes. The Illinois trial court had held that the protracted efforts of three state agents to locate A.S., the alleged victim of respondent's rape, were "superhuman" and went "way beyond due diligence," but that A.S. had made it impossible for the State to locate her because she did not wish to be found. App. 46a. Rather than limit its analysis to this Court's "clearly established" holdings as AEDPA requires, however, the Seventh Circuit relied on its own prior decisions (in pre-AEDPA and non-habeas cases) to announce a new rule of constitutional law and award habeas relief to respondent under that rule. Accordingly, this Court should grant the petition and reverse the Seventh Circuit's judgment, either summarily or after full briefing and argument.

The brief in opposition offers no reason to deny the petition. Respondent paints a skewed picture of the facts at odds with the state courts' controlling findings, mischaracterizes this Court's precedent and the decision below, and understates the importance of the Seventh Circuit's published decision as an invitation to void state criminal convictions without the deference that AEDPA demands. Ultimately, respondent makes the same fundamental mistake that the court below did—he considers it sufficient that the Seventh Circuit applied this Court's precedent reasonably in awarding habeas relief, when the proper question is whether the state courts applied that precedent unreasonably.

1. As described in detail in the petition, see Pet. 4-5, the prosecution undertook extensive

efforts—involving three employees over the course of more than two weeks—to find A.S. for respondent's second trial. The Illinois Appellate Court recounted these efforts, including repeated visits to the home of A.S.'s mother; a visit to the homes of A.S.'s father and an "old friend" of A.S.'s in Waukegan, Illinois; contact with A.S.'s brother; and inquiries of the Illinois Department of Public Aid, the Illinois Secretary of State, and other government agencies. App. 44a-46a. Meanwhile, as these investigations proceeded, A.S.'s mother waited two weeks, until the day before trial, before notifying prosecutors that her daughter had contacted her by phone and informed her that she was afraid to testify and would not be returning to Chicago. App. 4a, 45a. Finding that the State had "expended efforts that go way beyond due diligence"—efforts the court described as "superhuman"—but that A.S. simply did not want to be found, the state trial court admitted A.S.'s cross-examined testimony from the first trial, App. 46a, and the appellate court affirmed, App. 83a.

Contrary to these state court findings, respondent tries to depict the prosecutors as intentionally lazy in their search for A.S, see Br. in Opp. 2-5, but this effort fails. As an initial matter, respondent frequently cites his own lower-court briefs for factual statements that are not in the federal habeas record. See *id.* at 2-11. To be sure, the briefs themselves are "included in the 7th Circuit's record," as respondent insists, *id.* at 2 n.1, but

extra-record factual assertions in those briefs are not themselves part of the factual record in this case.[1]

More important, respondent's critique of the State's efforts is often misleading. For example, while he complains that the State failed to investigate certain possible leads, see Br. in Opp. 4-5, 17, 19-20, respondent fails to mention that he advanced this same argument in the state court, App. 51a, 77a, which found that pursuing these additional leads would have been "futile," App. 85a, a finding that respondent never challenged as "unreasonable" and that therefore controls on habeas review, see 28 U.S.C. § 2254(d)(2); see also 28 U.S.C. § 2254(e)(1) (requiring clear and convincing evidence to rebut state court's factual finding on federal habeas review).

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[1] In compliance with Rule 5(c) of the Rules Governing Section 2254 Cases in the United States District Courts, petitioner submitted two items from the state trial record to the district court: the State's motion to declare A.S. unavailable and the transcript from the motion hearing. Doc. 16 at 4-5; Doc. 19, Exhs. J & K. Respondent had an opportunity to introduce additional material he deemed necessary, but he did not submit the remainder of the trial record, and the district court did not request it. During appellate briefing, respondent belatedly moved to expand the record to include additional parts of the trial proceedings, but the district court denied the motion, Doc. 51, and the Seventh Circuit declined to rule on it, App. 3a n.1. The briefs that respondent now cites for factual support include references to the material that he unsuccessfully sought to make part of the record in federal court.

Nor is it clear what "further contact" the State should have "attempted" after learning that A.S. had phoned her mother. Br. in Opp. 5. Prosecutors only discovered that A.S. had called her mother on March 28, 2000, the day of the hearing on the State's motion to admit her prior testimony, App. 45a, and the day before respondent's second trial began, App. 4a, 46a. For the same reason, investigators were not "unreasonable," as respondent claims, for "mechanically visiting the morgue when the mother said [A.S.] was alive and had been speaking by telephone." Br. in Opp. 19. This again ignores the fact that prosecutors first learned that A.S. had called her mother only at the end of their investigation—two weeks after A.S. made the call—not at the beginning. App. 45a. Indeed, respondent even misdescribes the length of the investigation, claiming that it took less than two weeks, see Br. in Opp. 4, when in fact it continued for 15 to 18 days. Compare App. 45a; Doc. 19, Exh. K at E28 (search began between March 10 and March 13, 2000), with App. 4a, 45a (search ended on March 28, 2000).

In short, stripped of unsupported criticisms and errors, respondent's attempt to downplay the State's efforts to locate A.S. falls flat.

2.a. Respondent's legal points fare no better. Like the court below, he disregards the distinction, critical to the AEDPA framework, between a reasonable application of this Court's "clearly established" law and the *only* reasonable application of that law. Respondent insists that the Seventh Circuit ruled properly because the court "correctly relied on a combination of facts and circumstances to measure the lack of good-faith

diligence by the prosecutors to obtain the live witness for retrial," the "totality of the circumstances" test that this Court "required" in *Ohio v. Roberts*, 448 U.S. 56 (1980), overruled on other grounds by *Crawford v. Washington*, 541 U.S. 36 (2004). Br. in Opp. 16-17. But even if true, that proves merely that the Seventh Circuit reached a conclusion within the universe of reasonable outcomes under this Court's precedent. That may be sufficient to overturn a judgment on direct appeal, but it falls well short of the showing that AEDPA requires to void a state court conviction—that the state court's conclusion is "contrary to" or "unreasonable" under this Court's decisions. 28 U.S.C. § 2254(d)(1). Nothing in the decision below, or in the opposition brief, makes that showing.

b. Next, respondent makes much of the fact that the Seventh Circuit properly recited AEDPA's deferential standard of review, see Br. in Opp. 12, 17, but this does not permit the court to disregard that standard in practice. Routinely, this Court summarily reverses decisions, like the Seventh Circuit's here, that recite the proper AEDPA standard but fail to give it effect. See *Mitts v. Bagley*, 620 F.3d 650, 654 (6th Cir. 2010), rev'd, 131 S. Ct. 1762 (2011); *Jackson v. Felkner*, 389 Fed. Appx. 640, 640 (9th Cir. 2010), rev'd, 131 S. Ct. 1305 (2011); *Van Patten v. Deppisch*, 434 F.3d 1038, 1042 (7th Cir. 2006), vacated, 549 U.S. 1163 (2007), on remand to 489 F.3d 827 (7th Cir.), rev'd, 552 U.S. 120 (2008); *Cone v. Bell*, 359 F.3d 785, 790 (6th Cir. 2004), rev'd, 543 U.S. 447 (2005).

c. Respondent also fails in his effort to avoid the fact that—because this Court's good faith,

reasonableness standard for evaluating witness unavailability is a general one—state courts have substantial latitude in applying it. See Pet. 13 (citing *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011), and *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). While recognizing that the lodestar for analyzing witness unavailability under this Court's decisions remains "reasonableness," see Br. in Opp. 13, respondent mistakenly contends that this Court has meaningfully "refine[d]" and "narrow[ed]" that general standard with various "'safely emerge[d]' principles," "propositions," "components," and "underpinning[s]." *Id.* at 13, 14, 18, 23. But this is a substantial overstatement, as respondent himself seems to acknowledge when he describes the *Roberts* test as a "totality of the circumstances" inquiry, *id.* at 17, and when he chooses terms like "grounded in" and "underpinning" to describe the relationship between these "refinements" and this Court's precedent, *id.* at 13, 16.

In fact, this Court's three decisions on witness unavailability furnish no precise rules for defining reasonable, good faith efforts to locate an absent witness. *Barber v. Page* found a constitutional violation because state authorities there "made absolutely no effort" to secure the witness's presence at trial from a known location, a complete lack of effort that (not surprisingly) fell short of a "good-faith effort." 390 U.S. 719, 723-725 (1968). And contrary to repeated misstatements by the Seventh Circuit and respondent, App. 13a; Br. in Opp. 13-16, 20, *Berger v. California* did nothing more than hold that *Barber* was retroactive, see

393 U.S. 314 (1969) (*per curiam*). Finally, while *Roberts* holds that a State "*may*" have to undertake certain affirmative acts to find a witness, 448 U.S. at 74 (emphasis in original), and that futile acts are not required, see *ibid.*, this gives lower courts substantial latitude to decide what conduct is required and what is futile on the facts of each case.

Like the decision below, respondent places substantial weight on one particular "refinement" purportedly found in these decisions—a focus on whether prosecutors subpoenaed the missing witness. See Br. in Opp. 16 ("Every prosecutor knows, in accordance with *Roberts* and *Barber* and *Berger*, that a subpoena is important to deter a witness from fleeing and to empower an entire police department to apprehend and bring the witness to court."); *id.* at 15 (describing *Berger* as having "adopt[ed] *Barber*'s importance of a subpoena or comparable writ"); *id.* at 19 (criticizing State's failure to utilize a subpoena or bench warrant, "despite * * * the use of subpoenas in *Ohio v. Roberts* and the pivotal use of court process in *Barber v. Page*"). Again, however, respondent reads far too much into these decisions, which nowhere say that the State's resort to a subpoena is "important" or "pivotal" under the Sixth Amendment.

In *Barber*, the witness was incarcerated in an out-of-state prison. 390 U.S. at 723. Understandably, the Court faulted prosecutors for not using a "writ[] of habeas corpus *ad testificandum*" to ensure his presence at trial, where that was an established procedure for retrieving a federal prisoner to testify in state criminal proceedings. *Id.* at 724. *Barber* says nothing about

cases like this one, where a witness reneges on her prior promise to testify, goes into hiding, and cannot be located. Meanwhile, *Roberts* held merely that the State's service of useless subpoenas (at the home of the witness's parents, who did not know how to reach the witness, see 448 U.S. at 75) did *not* violate the Sixth Amendment. See Pet. 15. No prosecutor could extract from this decision petitioner's rule making a subpoena "pivotal" in most cases.[2]

d. While stressing the importance of the State's failure to issue a subpoena, on the one hand, respondent simultaneously claims that the Seventh Circuit never actually announced a subpoena requirement, on the other. According to respondent, although the decision below requires "the consideration of a subpoena as a factor" in determining witness unavailability, Br. in Opp. 21, the Seventh Circuit "never held that there is * * * a requirement" that the prosecutor obtain a subpoena, or otherwise adopted a "*per se* rule[]," *id.* at 21-23. But respondent is incorrect. The Seventh Circuit directed prosecutors to obtain a subpoena whenever the witness is both "reluctа[nt]" to testify and "critical" to the prosecution. App. 13a. It is impossible to construe this as anything other than a rule requiring a subpoena under these (presumably not

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[2] Nor would such a rule be desirable. As the petition explains, a "prosecutor may legitimately make the 'tactical decision * * * not to serve * * * a subpoena,' for fear the witness might flee in response." Pet. 20 (quoting *Dres v. Campoy*, 784 F.2d 996, 1000 (9th Cir. 1986)).

uncommon) circumstances, and lower courts will undoubtedly treat it as such.

In this way, the Seventh Circuit's decision is at odds with decisions of the Second, Eighth, Ninth, and Tenth Circuits, as detailed in the petition. None of these courts required prosecutors to take a specific, affirmative step (such as obtaining a subpoena) to establish a witness's unavailability. See Pet. 19-21. And because petitioner relies on these decisions, not as evidence of a "split in the circuits," Br. in Opp. 21, but to confirm the reasonableness of the state court's decision, see Pet. 21, respondent's nit-picking about factual differences between the decision below and these other cases, see Br. in Opp. 21-22, gets him nowhere.

e. Finally, while respondent does not dispute that AEDPA bars federal courts from awarding habeas relief based on constitutional rules announced only at the intermediate appellate level, see Pet. 16-19 (collecting cases), he insists that the Seventh Circuit did not violate this rule when it relied on a string of its own (non-habeas and pre-AEDPA) decisions, see Br. in Opp. 15. Respondent's theory appears to be that these prior Seventh Circuit decisions merely applied this Court's established constitutional doctrine, and that citing them is therefore no different than citing the opinions of this Court. See *ibid.*

But respondent misses the point. The Seventh Circuit relied on its own prior decisions, not as mere proxies for this Court's decisions—and indeed, it would make little sense to do so, for why cite lower court authority for principles equally well settled by this

Court's own cases—but for the way in which those Seventh Circuit decisions applied and expanded upon this Court's "clearly established" law. Thus, the Seventh Circuit cites its own prior decision in *United States v. Hite*, 364 F.3d 874 (7th Cir. 2004), cert. granted and judgment vacated, 543 U.S. 1103 (2005), for the specific proposition that an investigation is insufficient when it consists largely of talking to family members, App. 10a, a point that this Court has never made. And the Seventh Circuit relied on its prior decision in *United States v. Ochoa*, 229 F.3d 631 (7th Cir. 2000), to emphasize the importance of issuing a subpoena to establish prosecutorial good faith in securing a trial witness, App. 13a-14a, another proposition that this Court has never endorsed, see *supra* pp. 7-8. That these appellate decisions may have applied this Court's precedent reasonably is irrelevant; such lower-court decisions do not provide grounds for habeas relief because they expand constitutional doctrine beyond this Court's "clearly established" law.

3. In a final salvo, respondent argues that the petition presents a question that is neither recurring nor important. But here again respondent relies on a skewed view of the facts (urging that "the extremity of the prosecutor's aberrant behavior is unlikely to ever happen again," Br. in Opp. 25), and of the decision below (asserting that "[t]he Seventh Circuit never stated that subpoenas are 'required' in 'every case'" involving a critical and reluctant witness, *ibid.*). More fundamentally, respondent misdescribes the petition, which seeks review not of his Confrontation Clause claim as an original matter but of the Seventh Circuit's

failure to give the state court's findings of fact and conclusions of law the deference that AEDPA demands. This latter issue *is* both recurring and important, as this Court confirms each time it grants certiorari and summarily reverses a similarly flawed circuit court opinion. See Pet. 22-23 (collecting cases). The Seventh Circuit's announcement of a new constitutional rule and its use of its own precedent to fill gaps left open by this Court's precedent is obvious on the face of the decision below. If uncorrected, the court's failure to follow AEDPA, in the teeth of this Court's consistent admonitions, risks unsettling habeas review in the Seventh Circuit and beyond.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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